(9)

No. 97-461-CFX Title: Wisconsin Department of Corrections, et al., Petitioners
v.
Keith D. Schacht

Docketed:
September 12, 1997 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Sep 12 1997	Petition for writ of certiorari filed. (Response due October 12, 1997)
	Oct 22 1997	DISTRIBUTED. November 7, 1997
	Oct 27 1997	Waiver of right of respondent Keith D. Schacht to respond filed.
	Nov 3 1997	Response requested.
	Dec 3 1997	Brief of respondent Keith D. Schacht in opposition filed.
	Dec 17 1997	REDISTRIBUTED. January 9, 1998
	Dec 23 1997	Reply brief of petitioner Wisconsin Department of Corrections filed.
	Jan 12 1998	REDISTRIBUTED. January 16, 1998
	Jan 16 1998	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 27, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 27, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 13, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT April 20, 1998. **********
	Feb 20 1998	Joint appendix filed.
	Feb 26 1998	Brief of petitioner Wisconsin Department of Corrections filed.
	Feb 27 1998	Brief amici curiae of Alabama, et al. filed.
	Mar 26 1998	Brief of respondent Keith D. Schacht filed.
	Apr 1 1998	CIRCULATED.
	Apr 2 1998	Record filed.
	Apr 10 1998	Reply brief of petitioners Wisconsin Department of Corrections, et al. filed.
	Apr 14 1998	Record filed.
	Apr 20 1998	ARGUED.

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(1)

No. 97-461

In The

Supreme Court of the United States

October Term, 1996

WISCONSIN DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

On Petition for Writ of Certiorari
to the United State Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES E. DOYLE
Attorney General

RICHARD BRILES MORIARTY
Assistant Attorney General
Wisconsin Department of Justice
123 West Washington Avenue
Madison, Wisconsin 53707-7857
(608) 267-2796

49 pp

QUESTION PRESENTED

Where a plaintiff never objects to removing a civil action which asserted only federal claims under 42 U.S.C. § 1983, must the appellate court, on its own motion, vacate judgment for defendants, and remand the entire action to State court, simply because the plaintiff included claims which would be dismissed in any court?

LIST OF PARTIES

Respondent, KEITH D. SCHACHT, is referred to as "plaintiff." He sued, as defendants, WISCONSIN DEPARTMENT OF CORRECTIONS, and the following employes of Oakhill Correctional Institution: CATHERINE J. FARREY, individually and in her official capacity as warden, CYNTHIA O'DONNELL, individually and in her official capacity as associate warden, RITA SMICK, individually and in her official capacity as personnel manager, THOMAS LALIBERTE, individually and in his official capacity as an employe, RANDALL HEPP, individually and in his official capacity as an employe, and ONE OR MORE JOHN DOES, individually and in their official capacity as employes. Defendant, Wisconsin Department of Corrections, a State agency, employs the individual defendants and operates Oakhill Correctional Institution. Although plaintiff never amended his pleadings to name the unnamed defendants, he tried, through a brief to the district court filed shortly before the trial date, to add another Oakhill employe, B.J. MIKKLESON.

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No.

In The

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WISCONSIN DEPARTMENT OF CORRECTIONS,
et al.,

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

On Petition for Writ of Certiorari
to the United State Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Defendants respectfully request that a writ of certiorari issue to review the appellate court decision. The appellate court vacated summary judgment for defendants, and remanded the entire case to State court, solely because plaintiff, who never objected to removal, asserted federal claims against the State of Wisconsin under 42 U.S.C. § 1983 which would be dismissed in any court. Granting certiorari would allow the Court to more fully address important issues implicated by City of Chicago v.

International College of Surgeons, No. 96-910, 117 S.Ct. 1424 (1997) which, the parties in City of Chicago acknowledge in their briefs, are not adequately presented by the facts in that case.

OPINIONS BELOW

The appellate court opinion is reported (Schacht v. Wisconsin Department of Corrections, 116 F.3d 1151 (7th Cir. 1997)) and reprinted at App. 1-6. The district court opinion is unreported and reprinted at App. 7-14.

JURISDICTION

The decision was issued June 17, 1997. (App. 1.) The Petition is timely. Jurisdiction is invoked under 28 U.S.C. § 1254(1). The district court entered a judgment on the merits. App. 14. The appellate court had jurisdiction under 28 U.S.C. § 1291, vacated that judgment and directed a remand to the State court of this removed action. App. 6. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Grubbs v. General Electric Credit Corp., 405 U.S. 699, 700 (1972).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U. S. Const. amend. XI provides:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Wis. Const. art. IV, § 27 provides:

> **Suits against state.** SECTION 27. The legislature shall direct by law in what manner and in what courts suits may be brought against the state.

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343(a)(3) provides:

> **(a)** The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> **(3)** To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

28 U.S.C. § 1441 provides in pertinent part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district

courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending . . . .

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties . . . .

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Under 42 U.S.C. § 1983, Schacht filed an action in Wisconsin circuit court asserting the Due Process Clause of the Fourteenth Amendment (U.S. Const. amend. XIV) was breached in his being suspended without pay in January 1993, while work rule violations were

investigated, and discharged in February 1993 based on work rule violations. App. 1-2; 9-10. Defendants removed to federal court on a timely basis and Schacht never questioned the propriety of that removal until the appellate court, during oral argument following full briefing on the merits, called for supplemental briefs on that issue. App. 3, 5.

Granting defendants' dispositive motions, the district court had (a) dismissed claims against the State agency and official capacity claims on Eleventh Amendment grounds, (b) denied Schacht's request to name a new defendant, (c) found Schacht had asserted no substantive due process claims, and (d) granted summary judgment to defendants on the remaining individual capacity claims. App. 10-14. In his appeal, Schacht had not challenged the dismissal of either his claims against the State agency or his official capacity claims.

REASONS FOR GRANTING THE WRIT

The appellate decision is contrary to numerous established holdings of this Court and turns the shield of Eleventh Amendment immunity into a sword plaintiffs may unilaterally choose to wield against States.

The appellate court decision turns on reasoning contrary to numerous principles carefully developed by this Court which the appellate court itself has, in other contexts, acknowledged and applied. The appellate court decision assumed district courts have original jurisdiction in a civil action only if they can fully adjudicate every claim that is pled. Since Eleventh Amendment immunity, if asserted by a defendant, can prevent district courts from

fully adjudicating claims made against States, the appellate court, having made this assumption, felt compelled here to question the propriety of removal on its own motion, to vacate the district court disposition on the merits, and to require a remand to State court. This conclusion ignored the important distinctions between Eleventh Amendment immunity, which is for States to raise and which may be waived, and other types of jurisdictional bars. This conclusion also ignored this Court's prior signals that the definitional problem with claims under 42 U.S.C. § 1983 against States, that States are not "persons" under 42 U.S.C. § 1983, is a threshold barrier which made it entirely unnecessary to consider any jurisdictional effect Eleventh Amendment immunity might have had on the propriety of removal.

The appellate court decision allows plaintiffs, by including federal claims so flawed they could not be fully adjudicated in any court, both to avoid removal of viable federal claims and to deprive states of rights which Congress intended to grant all defendants. A writ of certiorari should issue.

A. The appellate court improperly construed "original jurisdiction" in 28 U.S.C. § 1441 to require an ability to fully adjudicate all claims a plaintiff pled in State court.

When a plaintiff, as here, never objects to removal and the district court proceeds to judgment, "the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." Grubbs v. General Electric

Credit Corp., 405 U.S. 699, 702 (1972). The appellate court correctly observed elsewhere that "[j]urisdiction exists in a removal action if the case might have been brought in federal court to begin with. [Citing Grubbs.]" Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 (7th Cir. 1993).

In the decision below, however, the appellate court dramatically deviated from the Grubbs standard through a set of assumptions drawn from its own decisions. (App. 3-4 citing Frances J. v. Wright, 19 F.3d 337 (7th Cir. 1994), *reh'g and reh'g en banc denied, cert. denied*, 513 U.S. 876 (1994); Intern. College of Surgeons v. City of Chicago, 91 F.3d 981 (7th Cir. 1996), *cert. granted*, 117 S.Ct. 1424 (1997); Gorka by Gorka v. Sullivan, 82 F.3d 772, 773 (7th Cir. 1996), *reh'g and reh'g en banc denied*.) It instead declared that a district court has jurisdiction in a removed action "only where the district court has the authority to **adjudicate all** of the claims" and that, to make removal proper, the district court "must" have had the power to "**determine all** the issues in the case." App. 3, emphasis added.

It then concluded that, because Eleventh Amendment immunity could be asserted against § 1983 claims made against the State, the district court lacked authority to fully adjudicate every federal claim plaintiff made under 42 U.S.C. § 1983. App. 3-5. This inability to adjudicate every claim was characterized as an "Achilles' heel" which rendered district court jurisdiction over this action void from the outset. App. 3. As a result, the appellate court believed it had to raise this issue at oral argument, on its own motion, and then vacate the district court judgment and direct a remand to State court. App. 5-6.

By erroneously assuming a district court has no original jurisdiction over a civil action unless it has the

power to fully adjudicate every claim a plaintiff may make, the appellate court decision grants plaintiffs the ability to bar States from removing cases with only federal claims. All a plaintiff needs to do to avoid removal is assert one claim which could be barred by Eleventh Amendment immunity. Eleventh Amendment immunity, by this decision, is transformed from a shield appropriate to a fellow sovereign in a federal system into a sword which plaintiffs can unilaterally use, contrary to Congressional intent, to demote States to second-class litigants. The assumptions made by the appellate court are erroneous on several levels.

The only claims plaintiff asserted here were claims under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as to which plaintiff expressly sought relief in his complaint under 42 U.S.C. § 1983. Had plaintiff filed this action in federal court, therefore, the district court, subject to two inapplicable and narrow exceptions,[1] would necessarily

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[1]Bell articulated two narrow exceptions, i.e., (1) that the claim "clearly appears to be immaterial and made solely to obtain jurisdiction" and (2) that the claim is "wholly insubstantial and frivolous." 327 U.S. at 682. Both were both plainly inapplicable. *See also* Jackson Transit Authority v. Transit Union, 457 U.S. 15, 21, n.6 (1982); Kennedy v. Connecticut General Life Ins. Co., 924 F.2d 698, 700 (7th Cir. 1991) ("subject-matter jurisdiction depends on an arguable claim, not on success"). Lewis v. U.S., 70 F.3d 597 (Fed. Cir. 1995) recently confirmed that this Court's holdings restrict the first Bell exception to situations where the plaintiff is not actually relying on the federal statute to assert the claim and restrict the second Bell exception to situations where it is "'very plain'" that the alleged federal claim is frivolous. 70 F.3d at 603-04. Though agreeing with the district court in Lewis that the plaintiff's only claim, a federal claim, was frivolous and "meritless", the appellate court in Lewis held that it fell well

have had original jurisdiction over his claims since they sought recovery "under the Constitution or laws of the United States." Bell v. Hood, 327 U.S. 678, 682-83 (1946). *See also* 28 U.S.C. §§ 1331, 1343(a)(3) and 1441. Indeed, "where the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for [those] possible exceptions . . . , **must** entertain the suit." 327 U.S. at 681-82, emphasis added. Plaintiff drafted his complaint to seek recovery, not just directly, but exclusively, under the Constitution or laws of the United States.

While plaintiff's individual capacity claims were ultimately adjudicated on the merits, the district court dismissed plaintiff's § 1983 claims against the State agency and his official capacity claims. App. 10. The appellate court apparently viewed this ultimate conclusion as a fatal flaw which rendered the district court proceeding a nullity. App. 4-5. The appellate court's error -- deeming the district court to lack any original jurisdiction over exclusively federal claims because one claim, at the time of removal, will not likely proceed to full adjudication -- may be understandable. Justice Frankfurter noted long ago:

> "As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action." [Citation omitted.] Petitioner asserts a substantial claim [under a federal statute.] Such assertion alone is sufficient to empower the District Court to assume jurisdiction

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outside the narrow confines of the Bell exceptions and that the district court had jurisdiction over the complaint. 70 F.3d at 603-04.

> over the case and determine whether, in fact, the [statute] does provide the claimed rights. "A cause of action under the law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact." [Citation omitted.]

Romero v. International Term. Operat. Co., 358 U.S. 354, 359 (1959), *reh'g denied*, 359 U.S. 962. Original jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and 1441 refers to the district court's threshold ability to consider a civil action, not whether individual claims may fall by the wayside before full adjudication on the merits.

Understandably, the looming presence of Eleventh Amendment immunity which plaintiff called into play by making claims against the State, and the box into which the appellate court had placed itself through Frances J. (*see* pp. 11-13 *infra*), increased the risk of confusion here. As Justice Thomas observed while an appellate judge:

> Given the wooliness of the concept [of federal jurisdiction], it is hardly surprising that there exists a significant gray area between grounds of decision that clearly are jurisdictional and grounds that clearly are not. . . . [Even where distinctions are made routinely,] the distinctions can prove elusive. [Citations omitted.] . . . . To complicate matters further, some provisions--the eleventh amendment, for example--can be jurisdictional in some contexts, and non-jurisdictional in others. *Compare Patsy v. Board of Regents*, 457 U.S. 496, 516, n. 19 . . . (1982) (stating that the eleventh amendment is not "jurisdictional in the

> sense that it must be raised and decided by this Court on its motion") *with Edelman v. Jordan*, 415 U.S. 651, 678 . . . (1974) ("[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.").

Cross-Sound Ferry Services, Inc. v. I.C.C., 934 F.2d 327, 341 (D.C.Cir. 1991) (Thomas, J., concurring in part).

The appellate court's decision in this action becomes harder to understand, however, in light of its recognition, in other decisions, both of this "wooliness" in Eleventh Amendment jurisdictional analysis and that it is not an issue the appellate court should raise on its own:

> The doctrine of Eleventh Amendment immunity, though often characterized as jurisdictional, does not function as a true jurisdictional bar. Unlike other forms of subject-matter jurisdiction, Eleventh Amendment immunity can, for example, be waived by consent. [Citation omitted.] The Supreme Court has declared, moreover, that "we have never held that [the Eleventh Amendment] is jurisdictional in the sense that it must be raised and decided by this Court on its own motion." [quoting Patsy.]

Komyatti v. Bayh, 96 F.3d 955, 959 n.4 (7th Cir. 1996).

Declaring that the propriety of removal is governed by whether one of a set of exclusively federal claims might be subject to Eleventh Amendment immunity is not only contrary to this Court's decisions and Congressional intent in enacting the removal statutes, it creates an unworkable

standard. A defendant served with a State court complaint which seems to assert claims barred by sovereign immunity would be placed in a dilemma Congress never intended. Plaintiffs, at times, allege "official capacity" claims so vaguely that it takes years, and multiple levels of courts, to sort out the allegations. *E.g.*, Shockley v. Jones, 823 F.2d 1068, 1070-72 (7th Cir. 1987) (difficult to detect Eleventh Amendment problems in vague pleadings); Jensen v. State Bd. of Tax Com'rs of State of Indiana, 763 F.2d 272, 278 (7th Cir. 1985) (same). In Shockley, the district court dismissed what it viewed as official capacity claims on Eleventh Amendment grounds. 823 F.2d at 1071-72. While acknowledging how confusing the distinctions can be, and were in Shockley, the appellate court ultimately concluded that plaintiffs' claims should be viewed as individual capacity claims. 823 F.2d at 1071-72.

Combining the Shockley setting with a hypothetical assumption that it commenced in State court exposes a significant gulf between the appellate decision in this case and any reasonable interpretation of the removal statutes. Under that hypothetical, if the case were removed before the State court was asked to address whether official capacity claims had been pled, would the propriety of removal hang in the balance pending ultimate resolution, on appeal, from a federal district court decision on that confusing issue? Alternatively, if removal efforts were deferred to obtain dismissal by the State court of what reasonably seemed to be official capacity claims, and the State court instead unexpectedly found only individual capacity claims were pled, would the removal option have been lost through untimeliness because defendants relied on plaintiffs' pleadings? 28 U.S.C. § 1447.

These questions need not be answered because Eleventh Amendment immunity simply is not the bar to removal detected by the appellate court decision in this

action. Eleventh Amendment immunity is instead a defense a State can choose to assert. Whether it does or does not ultimately do so hardly constitutes an "Achilles' heel" which bars removal at the door to the federal courts. App. 3. Actually, the choice of that analogy by the appellate court is telling. Eleventh Amendment immunity is not a breach in a State's protective armor by which a losing opponent may, on appeal, fatally defeat the State's removal efforts. *Cf.* Gorka, 82 F.3d at 773 (Eleventh Amendment immunity should only be a shield against State liability, not a "sword" States can wield). The appellate court goes farther than even this analogy allows since plaintiff, unlike Hector who at least had to fire a well-aimed arrow, did not take any action other than to plead baseless federal claims which would be dismissed in any court. The appellate court decision in this action so completely turns the protective nature of Eleventh Amendment immunity on its head that even district courts bound by Frances J. and its progeny have not read those decisions that broadly. *E.g.*, Smith v. Milwaukee County, 954 F.Supp. 1314, 1318, text and n.4 (E.D.Wis. 1997) (noting holdings in Frances J. and Gorka but declining to remand because the plaintiff there did not object to removal and Eleventh Amendment was not raised as a jurisdictional bar).

In the removal context, the decision below renders States second-class litigants. States should have the same rights as other litigants, when involuntarily brought into court on solely federal claims, to choose whether to remove those claims to federal court. Where federal question jurisdiction is the basis for removal, the Court long ago rejected any reading of the removal statutes grounded on "the character of the parties" rather than whether claims arise under the Constitution and laws of the United States.

E.g., Ames v. Kansas, 111 U.S. 449, 470-72 (1884) (holding removal of action brought by a State is to be treated the same as any other removed action). *See also* Illinois v. City of Milwaukee, 406 U.S. 91, 100-101 (1972). Yet the appellate court below would preclude removal of actions asserting solely federal claims because, based on the character of the defendants as a State agency and State officials, sovereign immunity could result in some claims being dismissed.

A sovereign State should not be treated as a second-class litigant when federal claims are made against the State. An alternative approach more respectful of state sovereignty would recognize that no jurisdictional analysis was required on appeal. Section 1983 claims against the State may be dismissed as a matter of statutory definition without considering Eleventh Amendment immunity at all.

B. Since States are, as a matter of statutory definition, not "persons" under 42 U.S.C. § 1983, it was unnecessary for the appellate court to consider the potential effects of Eleventh Amendment immunity on the district court's jurisdiction.

This Court has taken pains to clarify that it is unnecessary to focus on Eleventh Amendment immunity issues when analyzing requests for retrospective relief against States under 42 U.S.C. § 1983. Most recently, the Court reiterated in Arizonans for Official English v. Arizona, 117 S.Ct. 1055 (1997), that

> § 1983 actions do not lie against the State [citation omitted]. . . . The barrier [to the § 1983 claims] was not, as the Ninth Circuit [in that case] supposed, Eleventh Amendment immunity, which the State could waive. **The stopper was that § 1983 creates no remedy against a State."**

117 S.Ct. at 1069-70, emphasis added. In other decisions, the appellate court below had seemed to recognize that this definitional bar makes it unnecessary to reach Eleventh Amendment immunity. Instead, it is sufficient, to dismiss such claims, to simply note that "[p]ersonhood is an essential element of a § 1983 claim" and "a state is not a 'person' for purposes of § 1983." Lett v. Magnant, 965 F.2d 251, 255 (7th Cir. 1992), *reh'g and reh'g en banc denied*.

Though the appellate court below cited Arizonans for Official English for the general proposition that § 1983 actions do not lie against States (App. *), it overlooked the significance of the Court's distinction between Eleventh Amendment immunity and the statutory definition of "persons" in § 1983 and its critical notation that, while immunity could be waived, the "stopper was that § 1983 creates no remedy against a State." Arizonans for Official English, 117 S.Ct. at 1069-70. The appellate court decision in this action does not address that important distinction or its impact on the validity of its analysis.

When a case is removed which contains a claim under 42 U.S.C. § 1983 subject to potential dismissal based on Eleventh Amendment immunity, the point is that, though this immunity issue lurks dramatically in the background, the threshold inquiry is the non-jurisdictional bar derived from the definition of the word "person" in § 1983. As Arizonans for Official English recognized, the bar to a § 1983 claim against the State at the outset of an action is not necessarily Eleventh Amendment immunity -- which could ultimately drop away, based on waiver, as

an actual bar. The truly significant "stopper" is definitional, not jurisdictional, because Congress simply never intended to include States within its definition of "persons" in § 1983. 117 S.Ct. at 1069-70.

This distinction was first sharpened in Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989). Will examined whether § 1983 claims could be made against a State in its own courts -- where Eleventh Amendment immunity is unavailable. 491 U.S. at 63-64. In that factual setting, the Court expressly separated Eleventh Amendment jurisdictional analysis from the definitional analysis and focused completely on Congressional intent and statutory construction by a detailed study of applicable legislative history. 491 U.S. at 64-66. Though Will considered the existence of Eleventh Amendment immunity, and Congress' presumed respect for it, as confirmation that Congress intended to exclude States from the definition of "person," it appeared to establish that the definitional bar stood entirely on its own, regardless of Eleventh Amendment immunity, to defeat any § 1983 claim which sought retrospective relief from a State. 491 U.S. at 66-70.

Will underscored this apparent conclusion by leading off its citation of lower court decisions contrary to its holdings, i.e., those which had "taken the position that a State is a person" under § 1983, with a citation to Della Grotta v. State of R.I., 781 F.2d 343 (1st Cir. 1986). It is significant in this action that Della Grotta had concluded the State was a person for § 1983 purposes **because** the State there had waived Eleventh Amendment immunity. 781 F.2d at 348-49. The dissent in Will specifically cited Della Grotta and noted that the majority was holding to the contrary:

> To describe the breadth of the Court's holding is to demonstrate its unwisdom. If States are not "persons" within the meaning of § 1983, then they may not be sued under that statute regardless of whether they have consented to suit. Even if, in other words, a State formally and explicitly consented to suits against it in federal or state court, no § 1983 plaintiff could proceed against it because States are not within the statute's category of possible defendants.
>
> This is indeed an exceptional holding. . . . [I]t also renders ineffective the choices some States have made to permit such suits against them. See, e.g., Della Grotta v. Rhode Island, 781 F.2d 343 (CA1 1986). . . .

Will v. Michigan Dept. of State Police, 491 U.S. 58, 85-86 (1989) (Brennan, Marshall, Blackmun and Stevens, JJ., dissenting). Nothing in the majority opinion suggests that the dissent misread its holdings, and those holdings instead seemed to establish this definitional analysis as a bar to § 1983 claims against the States which is entirely separate from the bar of Eleventh Amendment immunity. Will, 491 U.S. at 60-71.

Any lingering doubt was dispelled the following term in Ngiraingas v. Sanchez, 495 U.S. 182 (1990) (Brennan & Marshall, J.J., dissenting). Ngiraingas addressed whether § 1983 claims could be made against territories, and the Court not only emphasized the distinction between the definitional analysis and the Eleventh Amendment analysis, it indicated that the definitional analysis should be conducted first. 495 U.S. at 183-92. The Court noted that the appellate court had not

reached any Eleventh Amendment analysis because, as a threshold matter, it had concluded that territories were not, as a matter of statutory construction, within the meaning of the term "persons" in § 1983. 495 U.S. at 185, n.2. Similarly, the Ngiraingas Court, despite the critique of the dissenting Justices noted below, conducted no Eleventh Amendment immunity analysis. 495 U.S. at 183-92. It instead inquired into this definitional analysis and found it to bar any § 1983 claims against territories, just as it bars such claims against States. 495 U.S. at 183-92.

Justices Brennan and Marshall, in dissent, expressly emphasized their view, contrary to the majority, that "the absence of any immunity on the part of Territories from congressional enactments" should have led to a conclusion in Ngiraingas that Territories, unlike States, were "persons" under § 1983. Ngiraingas, 495 U.S. at 193. Though the dissenting Justices addressed, in detail, the distinctions between States and Territories regarding Eleventh Amendment immunity (*id.*, 495 U.S. at 202-03), the Ngiraingas majority apparently saw no need, in justifying its decision, to examine immunity issues as part of that definitional analysis, or even to mention those issues once it concluded that Congress did not intend Territories to be "persons" under § 1983 (495 U.S. at 183-92).

The present significance of these messages from the Court is that it was unnecessary for the appellate court below to view Eleventh Amendment immunity as an absolute bar to removal and was also contrary to both Congressional intent underlying several statutory schemes and to this Court's designated methods of analysis. Instead, the appellate court should have recognized that, as a non-jurisdictional matter, § 1983 claims simply cannot be made against States and turned to the merits of the

appeal. This was the procedure followed by the Ninth Circuit Court of Appeals in Kruse v. State of Hawai'i, 68 F.3d 331 (9th Cir. 1995) which, sharply criticizing the rationale in Frances J., held that district courts should dismiss removed claims to which Eleventh Amendment immunity might apply by focusing on this definitional analysis rather than any jurisdictional questions. 68 F.3d at 334. *See also* Office of Hawai'ian Affairs v. Department of Educ., 951 F.Supp. 1484, 1489-90 (D. Hawai'i 1996) (comparing Frances J. and Kruse); Henry v. Metropolitan Sewer Dist., 922 F.2d 332, 338 (6th Cir. 1990).

Frances J., the primary decision on which the appellate court decision in this action was based, appeared driven by a concern that the State of Illinois may have removed to federal court to avoid having to address the merits of a particular claim, barred in federal court, as to which no similar bar existed in State court. 19 F.3d at 342-43. Having created the broad holdings in Frances J. in apparent response to a perceived defense strategy in that particular case, the appellate court placed itself in a box from which the appellate court decision in this action ultimately emerged. The impropriety of a judicial body restricting the original jurisdiction as defined by district courts in response to a perceived defense strategy in a particular case is disclosed by recognizing that the § 1983 claims against the State in this action would have also been dismissed by Wisconsin courts.

Had this action remained in Wisconsin court, the claims against the State agency and the official capacity claims would, without question, have been dismissed based on sovereign immunity under Wis. Const. art. IV, § 27, or based on failure to state claims on which relief may be granted, or on both grounds. *E.g.*, Lindas v. Cady, 150 Wis. 2d 421, 431, 441 N.W.2d 705 (1989) (State agency may not be sued for monetary relief under 42 U.S.C. § 1983 since "states are not 'persons' within the meaning of sec. 1983"), *aff'g in part and rev'g in part*, 142 Wis. 2d

857, 419 N.W.2d 345 (Ct. App. 1987); Lindas v. Cady, 142 Wis. 2d 857, 861-62, 419 N.W.2d 345 (Ct. App. 1987), *aff'd in part and rev'd in part*, 150 Wis. 2d 421, 431, 441 N.W.2d 705 (1989). *See also* Boldt v. State, 101 Wis. 2d 566, 584-85, 305 N.W.2d 133 (1981) ("There is no provision in the Wisconsin Statutes giving consent to sec. 1983 or other civil rights actions" against a State agency). The outcome as to the claims against the State agency and the official capacity claims would have been the same in Wisconsin courts as it was in federal court.

Though the appellate court recognized the outcome would be the same in both Wisconsin and federal courts, they held that there is no "futility" exception under the removal statutes citing Primate Protection League v. Tulane, 500 U.S. 72 (1991). App. 5. Actually even this conclusion may be invalid since the subsequent history of the Primate Protection League may well suggest that, where remand of a removed claim barred by Eleventh Amendment immunity would clearly be futile, dismissal of the claim by the federal court is the correct approach. *See* In re Adm'rs of the Tulane Educational Fund, 954 F.2d 266 (5th Cir. 1992), *on remand*, Primate Protection League v. Tulane, 1992 WL 329555 (E.D.La. 1992), *aff'd* 22 F.3d 1094 (5th Cir. 1994), *reh'g and reh'g en banc denied*, 25 F.3d 1046 (5th Cir. 1994), *cert. denied*, 513 U.S. 1032 (1994). The Court decided remand to the State court was required after identifying legal and factual "uncertainties" about how the State courts might resolve the claims involved. Primate Protection League, 500 U.S. at 89. It then took "note" that the language of 28 U.S.C. § 1447(c), read literally, seemed to require remand where the district court lacked subject-matter jurisdiction, reversed the appellate decision and remanded to the district court with directions to remand the case back to the State court. *Id.* After the district court followed the instructions of the Supreme Court to remand the case to the State court, the case was

again removed to the district court. In re Adm'rs of the Tulane Educational Fund, 954 F.2d at 267-68. The district court concluded that the uncertainties identified by the Court were still unresolved and, on that basis, remanded to the State court once again. In re Adm'rs of the Tulane Educational Fund, 954 F.2d at 268. The appellate court, however, granted mandamus and vacated this second remand order holding that:

> The Supreme Court merely declined to speculate on hypothetical circumstances that were not then before it. **The problem is now a concrete one** [since the defendant removed the case a second time citing its authority under 28 U.S.C. § 1442(a)(1)] . . . . That the Supreme Court declined to speculate on whether [defendant meets a statutory definition] on the record before it, does not mean that the district court may remand these issues to the state court. Although it is not perfectly clear to us that any interpretation of state law is necessary, **even if it [were], a district court does not enjoy the luxury of remanding a case to a state court to interpret state law or to make a record**. The district court must decide for itself whether [the "uncertainties" identified in the Supreme Court decision render remand, after the subsequent removal, "futile".]

954 F.2d at 270.

The appellate court, facing the certainty that Wisconsin courts would, as it observed, dismiss the § 1983 claims against the State because the State is not a "person" under § 1983 (App. 5), should not have narrowed its analysis to whether a futility exception does or does not

exist. Instead, as defendants argued in their supplemental brief, this fact should have caused the appellate court to revisit the flawed reasoning in Frances J. and its progeny.

The proper approach was taken in a district court decision issued after Frances J., which, as here, addressed a removed action in which § 1983 claims were made against the State of Wisconsin. Weinberger v. State of Wis., 906 F.Supp. 485, 491 (W.D.Wis. 1995). The observations made in Weinberger apply here:

> It is true that the Eleventh Amendment is a bar to federal jurisdiction [citation omitted] and has no operative effect in the state courts, but plaintiff's state court suit against the state and against its employees in their official capacities would have gone aground for other reasons. In state court [in Wisconsin], the principle of sovereign immunity protects the state [of Wisconsin] from being sued without its consent. Moreover, neither the state nor its officials acting in their official capacities can be sued under § 1983 in **any** court, state or federal, because they are not "persons" under § 1983. [Citation omitted.] Therefore, even if defendants had not removed this case [from Wisconsin circuit court], plaintiff **could not have** proceeded against the state or against defendant Chester in her official capacity under § 1983.

906 F.Supp. at 491, emphasis added. The appellate court below acknowledged Weinberger, and its own decision in Smith v. Wisconsin Dept. of Agriculture, 23 F.3d 1134, 1139 (7th Cir. 1994) where, in another removed action, only the claims against the State were remanded to State

court and the district court disposition of other claims affirmed. App. 5-6. It sought to dismiss the contrary messages sent by those two decisions based solely on its view that "the jurisdictional issue was not called to the court's attention" in those cases. App. 5-6.

This is a curious and unsatisfactory response to Weinberger and Smith. Since the plaintiff in Weinberger, at the district court level, expressly "argue[d] that defendants should not be permitted to assert Eleventh Amendment immunity because they removed this case from state court" (906 F.Supp. at 491), and plaintiff here was completely silent about removal until the appellate court first raised the issue during oral argument (App. 5-6), the issue was far more concretely before the district court than it was here. Though Frances J. and its progeny are not cited in Weinberger, the same cannot be said for the appellate court's own decision in Smith. 23 F.3d at 1139. Smith, based expressly on Frances J. -- and addressing, presumably, "the jurisdictional issue" (App. 5-6) -- remanded to State court only those claims it deemed barred by Eleventh Amendment immunity, noting it could not be certain those claims would have been dismissed in Wisconsin courts. 23 F.3d at 1139. Despite Frances J., the Smith court affirmed the district court's rulings on the remaining claims in favor of the defendants on the merits. *Id.*

The Weinberger approach was the correct one. The appellate court should have moved past any questions about the propriety of removal, noting § 1983 claims cannot, from a definitional viewpoint, be made against the State, and instead addressed the merits already fully briefed before oral argument. Alternatively, the Smith approach could have been used to eliminate those claims the parties had fully litigated on the merits without any challenge to removal, and only remand to Wisconsin courts

those § 1983 claims against the State which were potentially subject to Eleventh Amendment immunity. The appellate court in this action instead considered the district court proceedings null and void and required the defendants to litigate this case all over again in State court. That conclusion is contrary to this Court's directives, as recognized by the appellate court itself in other settings, and contrary to Congressional intent, and should be corrected by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

JAMES E. DOYLE
Attorney General

RICHARD BRILES MORIARTY
Assistant Attorney General
State Bar No. 1017190

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796

No.

In The

Supreme Court of the United States

October Term, 1996

WISCONSIN DEPARTMENT OF CORRECTIONS,
et al.

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JAMES E. DOYLE
Attorney General

RICHARD BRILES MORIARTY
Assistant Attorney General
State Bar No. 1017190
Wisconsin Department of Justice
123 West Washington Avenue
Madison, Wisconsin 53707-7857
(608) 267-2796

Keith D. SCHACHT, Plaintiff-Appellant,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS, et al., Defendants-Appellees.

No. 96-3633.

United States Court of Appeals,
Seventh Circuit.
Argued April 21, 1997.
Decided June 17, 1997.

Before BAUER, CUDAHY and DIANE P. WOOD, Circuit Judges.

DIANE P. WOOD, Circuit Judge.

The dispute in this case began when plaintiff Keith Schacht was discharged from his position as a correctional officer at the Oakhill Correctional Institution, located in Oregon, Wisconsin. Believing that the Wisconsin Department of Corrections (WDOC) and several officials at the correctional facility (acting in both their individual and official capacities) denied him his right to both substantive and procedural due process in the pre- and post-termination proceedings, Schacht filed suit in Dane County Circuit Court, alleging various violations of 42 U.S.C. § 1983. The defendants, relying on 28 U.S.C. § 1441(a), then removed the case to federal court, where the district court below dismissed the claims against the state defendants that were barred by sovereign immunity and granted summary judgment to the defendants on all remaining claims. Unfortunately, all of these efforts were for naught. Because the district court lacked subject matter jurisdiction over this case, we must vacate its judgment and instruct the district court to send all claims back to square one--Dane County Circuit Court.

I

On the morning of January 21, 1993, Keith Schacht had just completed his overnight shift at Oakhill and was headed for the exit door when he was stopped by defendant Captain Thomas Laliberte, who pulled Schacht aside and asked Schacht to empty his backpack. Schacht complied, and the ensuing search established that his backpack contained (among other things) two garbage bags, six pens, two pounds of government commodity butter, and a three-ounce tube of toothpaste. To the defendants, each of these items appeared similar to items used in the facility. Their presence in the backpack therefore confirmed the defendants' suspicions that Schacht had been stealing items from the prison. Schacht, however, maintained that the pens, butter, and toothpaste all belonged to him, and that it was a common practice, in which the prison management acquiesced, for Oakhill employees occasionally to take garbage bags for their personal use.

The upshot of all this for Schacht was a suspension without pay pending an investigation. The prison officials conducted a series of interviews and hearings, but Schacht believed the deck was stacked against him, as the hearings were conducted by Laliberte and Randall Hepp, both of whom Schacht believed were biased against him for being too much of a "by the book" officer. Ultimately, Schacht was formally discharged on February 18, 1993, and after aborted efforts at various grievance proceedings, Schacht filed suit in Wisconsin state court. In his complaint, which named the WDOC and a host of employees at Oakhill as defendants, Schacht asserted that he had been wrongfully discharged and deprived of his constitutionally protected liberty and property interests in continued employment, all in violation of the due process clause of the federal Constitution. The complaint asked for compensatory and punitive damages against all defendants, as well as costs, fees and any other relief the court deemed appropriate.

II

At this point, all was well. Unbeknownst to both sides, however, the roof fell in when the defendants removed (without objection from Schacht) the case to federal court and the district court proceeded to resolve the case on the merits. The Achilles' heel of the case was the group of claims for monetary damages against the WDOC and the state officials in their official capacities, which were barred by sovereign immunity. The presence of these claims meant that the district court did not have original jurisdiction over the entire action, and thus that the defendants' removal under 28 U.S.C. § 1441 was improper.

We explained why this is so in Frances J. v. Wright, 19 F.3d 337 (7th Cir.1994), in which state defendants similarly tried to remove an action containing claims barred by state sovereign immunity as reflected in both the Eleventh Amendment and Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). We concluded that the district court lacked jurisdiction over the case because sovereign immunity acted as a limit on the original subject matter jurisdiction of the courts with respect to the barred claims (rather than as a form of common law immunity). Frances J., 19 F.3d at 340, citing Crosetto v. State Bar of Wisconsin, 12 F.3d 1396, 1400 (7th Cir.1993). The lack of jurisdiction over some claims in the case precluded removal of the action as a whole, because § 1441(a) confers removal jurisdiction only where the district court has the authority to adjudicate all of the claims in the case. Frances J., 19 F.3d at 341. In so holding, we rejected the notion that the district court could cure this problem by simply dismissing or remanding the barred claims. Section 1441(c) contemplates certain cases in which separate and independent removable claims are joined with others that are not removable, but it gives the district court the choice of retaining the full case and "determining all issues" therein, or remanding all matters in which state law predominates. As we pointed out in Frances J., this implies that the district court must have the power to determine all the issues in the case, either through original

or supplemental jurisdiction. Claims barred by sovereign immunity stand on different footing than other claims that are not independently removable, because of the affirmative limitation on jurisdiction imposed by the sovereign immunity doctrines. See Frances J., 19 F.3d at 340 n. 4. Under § 1441, "if even one claim in an action is jurisdictionally barred from federal court by a state's sovereign immunity, or does not otherwise fit within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal courts, then, as a consequence of § 1441(a), the whole action cannot be removed to federal court." Frances J., 19 F.3d at 341. See also International College of Surgeons v. City of Chicago, 91 F.3d 981, 987 (7th Cir.1996) ("removal is proper only if the action originally could have been brought in the district court"), cert. granted, --- U.S. ----, 117 S.Ct. 1424, 137 L.Ed.2d 534 (1997); Gorka by Gorka v. Sullivan, 82 F.3d 772, 774-75 (7th Cir.1996) (following Frances J.); 28 U.S.C. § 1441(a) (discussing removability of actions, rather than claims).

In Schacht's case, it is evident that at the time of removal, the complaint included several claims that were barred by sovereign immunity. Schacht wanted monetary relief from the WDOC and from five Oakhill employees, whom he was suing in both their official and individual capacities. Since the State of Wisconsin would be the real party in interest with respect to the official capacity and WDOC claims, the district court could not adjudicate those claims without an authoritative waiver of the state's sovereign immunity. See Frances J., 19 F.3d at 342, citing Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963) (noting that a lawsuit is against a sovereign if the judgment from successful claims would inevitably be paid from the public treasury). See also Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305-06, 110 S.Ct. 1868, 1872-73, 109 L.Ed.2d 264 (1990) (A state's waiver of sovereign immunity must be explicit and unambiguous). The defendants here and the district court below were undoubtedly aware of this problem, as it took no time for the district court to grant the defendants' motion to dismiss the claims against the WDOC and the

Oakhill employees in their official capacities. As we noted above, however, the dismissal of the barred claims on the merits did not cure the initial defect in removal.

At oral argument, we raised the issue of jurisdiction and the propriety of removal sua sponte, and requested supplemental briefing from both sides on the relevance of Frances J. to this case. See Edelman v. Jordan, 415 U.S. 651, 677-78, 94 S.Ct. 1347, 1362-63, 39 L.Ed.2d 662 (1974) (subject matter jurisdiction can be addressed at any stage of a given legal proceeding). Schacht opted to concede the jurisdictional flaw, but the defendants contend that we may reach the merits of this case notwithstanding Frances J. because remand would be futile and would result in a waste of judicial resources. Specifically, the defendants contend that if we remand, the state court will simply dismiss the official capacity claims and the claims against the WDOC for failing to state a claim on which relief may be granted, or on grounds of sovereign immunity, and duplicate the analysis the district court devoted to the remaining claims. See Lindas v. Cady, 150 Wis.2d 421, 441 N.W.2d 705, 709 (1989) (noting that "states are not 'persons' within the meaning of § 1983"). See also Arizonans for Official English v. Arizona, --- U.S. ----, ----, 117 S.Ct. 1055, 1069, 137 L.Ed.2d 170 (1997) (noting that "sec.1983 actions do not lie against a State").

Even if the defendants have accurately forecast the fate of this case on remand, we are not free to disregard a jurisdictional defect. See Arizonans, --- U.S. at ----, 117 S.Ct. at 1071. Contrary to their suggestion, there is no "futility" exception to § 1447(c). The Supreme Court noted that the literal words of § 1447(c) leave no room for such an exception. See Primate Protection League v. Tulane Educational Fund, 500 U.S. 72, 89, 111 S.Ct. 1700, 1710, 114 L.Ed.2d 134 (1991). See also 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.") (Emphasis added). Furthermore, in Smith v. Wisconsin Dept. of Agriculture, we rejected an identical "futility" argument, instead holding that remand was required even if the state court would only respond by

dismissing the remanded claims. 23 F.3d 1134, 1139 (7th Cir.1994). Although in some previous cases involving the removal of claims barred by sovereign immunity (of which Smith was one), we have remanded only the barred claims, while deciding the remaining claims on the merits, the jurisdictional issue was not called to the court's attention. See, for example, Smith, 23 F.3d at 1142-43. See also Weinberger v. Wisconsin, 906 F.Supp. 485, 491 (W.D.Wis.1995), judgment aff'd, 105 F.3d 1182 (7th Cir.1997). They do not, therefore, support the proposition that the Frances J. rule is limited in its application. Last, while the principles of judicial economy are not to be taken lightly, these principles cannot override constitutional or statutory limits on subject matter jurisdiction. We regret that the improper removal in this case will lead to yet additional litigation, but we remind both sides that much time and effort could have been saved had further consideration been given to the propriety of removal at the outset.

We therefore VACATE the judgment of the district court, and REMAND this case with instructions for the district court to remand the entire action to state court. Although Schacht requested costs and attorneys' fees in his supplemental brief, we agree with the state that his request was improperly presented and without merit in any event. Each side is to bear its own attorneys' fees and costs on appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEITH D. SCHAC[H]T,
Plaintiff,

v. MEMORANDUM AND ORDER

WISCONSIN DEPARTMENT OF CORRECTIONS, CATHERINE J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE and RANDALL HEPP,
Defendants. 96-C-122-S

Plaintiff Keith D. Schac[h]t commenced this civil action pursuant to 42 U.S.C. §1983 in Dane County Circuit Court. Defendants Wisconsin Department of Corrections, Catherine J. Farrey, Cynthia O'Donnell, Rita Smick, Thomas Laliberte and Randall Hepp removed the action to this Court. Plaintiff alleges that he was suspended without pay and subsequently terminated from his employment by the defendants without due process of law.

On July 15, 1996 defendants filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere

allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Keith D. Schact [sic] was employed as a correctional officer at Oakhill Correctional Institution, Oregon, Wisconsin (OCI). Defendant Wisconsin Department of Corrections is an agency of the State of Wisconsin. At all times material to this action, defendant Catherine J. Farrey was the warden, and defendant Cynthia O'Donnell was the associate warden at OCI. Defendant Rita Smick was the personnel officer. Defendants Thomas Laliberte and Randall Hepp were correctional officers.

On February 8, 1992 plaintiff attested in writing that he had carefully read the Department of Corrections Work Rules and Code of Ethics. The Work Rules provided in pertinent part as follows:

> All employees of the Department are prohibited from committing any of the following acts:
>
> ....
>
> 3. Stealing or unauthorized use... of state-owned or leased property, equipment or supplies.
>
> 7. Failure to provide accurate and complete information when required by management....

Plaintiff knew that a violation of these Work Rules was considered sufficient grounds for disciplinary action ranging from reprimand to immediate discharge.

Prior to January 21, 1993 defendant Farrey suspected, based on a written statement by Sergeant B. J. Mikkleson and reports by inmates, that plaintiff was stealing food. On this information she authorized a search of plaintiff to be conducted as he was walking toward the parking lot after his shift.

Defendant Laliberte asked plaintiff as he was leaving Oakhill on January 21, 1993 to return to the Administration Building. Plaintiff's union representative was also present. Defendant Laliberte searched plaintiff's backpack. He found two pounds of butter wrapped in two plastic garbage bags, six pens and one 3 ounce tube of toothpaste. The two plastic bags were Oakhill property. Defendant Laliberte spoke to Bill Hartwig, the Food Service Manager, concerning the butter and its labeling used by Oakhill. It matched the butter in plaintiff's backpack. Defendant Laliberte suspended plaintiff without pay pending an investigation.

Defendants Laliberte and Randall Hepp held investigatory interviews with plaintiff on February 4, 1993 and February 12, 1993. It is disputed whether or not plaintiff provided accurate and complete information during these meetings. It is also disputed whether defendants conspired to terminate his employment, trumped up false charges against him and acted in bad faith.

A pre-disciplinary meeting was held with plaintiff on February 17, 1993 with a union representative present on plaintiff's behalf. Plaintiff had received notice of the meeting at least 24 hours prior to the meeting informing him of its purpose. At the meeting Plaintiff was told that there was a factual basis for finding he had violated Work Rule 3, removing state owned property without authorization and Work Rule 7, failing to provide complete and accurate information. He was advised that the potential discipline for such violations was termination.

Plaintiff was asked whether he had any statement he would like to and he replied, "No".

On February 18, 1993 a meeting was held with plaintiff and his union representative at which a letter dated February 18, 1993 from Farrey terminating his employment was read. Plaintiff was again asked if he wished to make a statement and he declined.

Plaintiff applied for unemployment compensation benefits after he was suspended without pay on January 21, 1993 and filed an additional application after he was discharged from employment effective February 18, 1993. Under plaintiff's union contract he had rights to file grievances challenging both the suspension without pay and the discharge. He pursued his grievances through the third step of the discharge. He pursued his grievances through the third step of the process. On June 3, 1993 the union decided not to pursue plaintiff's grievance to arbitration.

MEMORANDUM

Plaintiff claims that he was deprived of property and liberty interests in violation of the Fourteenth Amendment due process clause pursuant to 42 U.S.C. § 1983. Defendants contend that plaintiff's claims against the Wisconsin Department of Corrections and the individual defendants in their official capacities are barred by the Eleventh Amendment. Plaintiff agrees his claims for money damages are barred but pursues his claims for injunctive relief. Plaintiff does not, however, request injunctive relief in his complaint and such relief is not appropriate where plaintiff is seeking monetary relief rather than reinstatement. Defendants' motion to dismiss plaintiff's claims against the Wisconsin Department of Corrections and the individual defendants in their official capacities will be granted.

Plaintiff seeks to add Sergeant B. J. Mikkleson as a defendant in this action. This motion will be denied as untimely under Rule 20, Federal Rules of Civil Procedure. There are no allegations that Mikkleson participated in the

decisions to suspend or terminate plaintiff or that he denied him due process protections. Nor is there any reason to delay trial at this late date in the event further proceedings should become necessary as a result of the addition requested. Final pre-trial conference and discovery have been held and completed respectively.

Plaintiff claims that he was deprived of his continued employment without procedural due process protections when he was suspended without pay on January 21, 1993 and terminated on February 18, 1993. For purposes of deciding defendants' motion for summary judgment it is assumed that plaintiff had both protected property and liberty interests in his continued employment. Defendants move for summary judgment based ont he ground that plaintiff received the due process protections to which he was entitled. Any disputes of fact remaining concerning plaintiff's conduct or the investigation itself are not material or relevant to resolve defendants' motion.

In his complaint and brief in opposition to defendants' motion for summary judgment plaintiff pursues a procedural due process claim and further contends that defendants conspired to terminate his employment, trumped up false charges against him and acted in bad faith. He claims he was not treated fairly and impartially. Although not pursued by either party plaintiff may be arguing that this unfairness violated his substantive due process rights.

The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. Zinermon v. Burch, 494 U.S. 113, 125 (1190). To state a substantive due process claim, in addition to alleging that the decision was arbitrary and irrational, plaintiff must show either a separate constitutional violation or the inadequacy of state law remedies. New Burnham Prairie Homes v. Village of Burnham, 910 F. 2d 1474, 1481 (7th Cir. 1990). Plaintiff has neither alleged nor shown a separate constitutional violation. Further, he has not alleged or shown the inadequacy of state law remedies. Finally, plaintiff has

neither stated a substantive due process claim nor cited any authority for it.

Accordingly, the Court addresses plaintiff's only claim, that of procedural due process. Plaintiff was suspended without pay on January 21, 1993. He did not receive an opportunity to be heard prior to his suspension. The Seventh Circuit Court of Appeals addressed the question of whether a pre-suspension hearing is a required procedural due process protection in Jones v. City of Gary, Indiana, 57 F. 3d 1435 (7th Cir. 1995). The Court applied the three factors provided in Matthews v. Eldridge, 424 U.S. 319, 335 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Applying these factors to the case of Jones, a firefighter, who was suspended without pay for failing to return to work from sick leave, the Court held as follows:

> Thus, there was no risk that Jones was erroneously deprived of his protected interest in employment without a pre-suspension hearing and thus we hold that Jones was not denied due process by the failure of the fire department to provide him with a pre-suspension hearing.

Jones, 57 F.3d at 1443.

In Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F. 3d 623 (7th Cir. 1995), the Court held that a bus driver who was suspended without pay after an accident was not entitled to a pre-suspension hearing under the due process clause. The Court stated at p. 628:

> Applying *Matthews* and these subsequent cases to the facts at hand, we have little trouble concluding that due process did not mandate giving Chaney additional notice or a hearing before Pace suspended him. Chaney's interest in avoiding a suspension is significant. Nevertheless, Chaney was on notice to why he was being suspended and Pace's interest in both managerial efficiency and in public safety clearly outweigh Chaney's interest in a pre-suspension hearing. The Constitution does not mandate additional protections at this stage.

Here plaintiff was a correctional officer accused of stealing. He was suspended without pay on January 21, 1993 without an opportunity to be heard. Plaintiff was advised of the reason for this suspension. Using the Matthews factors, the government's interest in the efficient and safe operation of the correctional institution outweighs the plaintiff's interest in a pre-suspension hearing. An investigation was conducted after the suspension and plaintiff was given an opportunity to be heard in two interviews and at a pre-disciplinary hearing. These procedures lessened the risk of an erroneous deprivation of plaintiff's protected interests. Due process does not require that plaintiff be provided a pre-suspension hearing.

Plaintiff also claims that he was denied due process protections when he was terminated on February 18, 1993. In Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542-43 (1985), the United States Supreme Court held that a person who has a property interest in employment may not be discharged without a prior opportunity to hear the employer's evidence and respond to the claims against him. The pre-termination opportunity to be heard need not be elaborate if there is timely post-termination process. Id. The Court held in Chaney that due process required a pre-termination notice and an opportunity to respond where a bus driver was terminated after an accident even where post-termination procedures exist. The Court further

found that the grievance and arbitration procedures satisfied the requirements of post-deprivation due process.

It is undisputed that plaintiff was provided notice that he may be terminated for alleged violation of work rules. He was provided an opportunity to be heard at two investigatory interviews. At a pre-disciplinary hearing on February 17, 1993 he was given an opportunity to be heard on the charges. When the letter of termination was read to him at a meeting the following day he was also given an opportunity to make a statement. Plaintiff was given notice and an opportunity to be heard prior to his February 18, 1993 termination. This satisfied the pre-termination due process requirement.

Subsequent to his termination plaintiff pursued the grievance procedures available to him. These procedures satisfied the requirements of post-deprivation procedural due process.

Plaintiff received the procedural due process protections to which he was entitled concerning both his suspension and his termination. Accordingly, defendants' motion for summary judgment will be granted.

ORDER

IT IS ORDERED that plaintiff's motion to add Sergeant B.J. Mikkleson as a defendant is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants against the plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 13th day of September, 1996.

BY THE COURT:
/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEITH D. SCHACHT,
Plaintiff,

v.

ORDER

WISCONSIN DEPARTMENT OF CORRECTIONS, CATHERINE J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE, and RANDALL HEPP,
Defendants.

96-C-122-S

Pursuant to judgment previously entered in the above entitled matter by the United States Court of Appeals for the Seventh Circuit on June 17, 1997,

ORDER

IT IS ORDERED that the above entitled action is REMANDED in its entirety to the Circuit Court for Dane County, Wisconsin.

Entered this 15th day of July, 1997.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT BRANCH 13

KEITH D. SCHACHT,

Plaintiff,

v. Case No. 95 CV 3087

WISCONSIN DEPARTMENT OF CORRECTIONS, KATHRYN J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE, RANDALL HEPP and ONE OR MORE JOHN DOES,

Defendants.

ORDER GRANTING MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF PETITION FOR WRIT OF CERTIORARI

This court having before it defendants' Motion to Stay Proceedings Pending Resolution of Petition for Writ of Certiorari, and being advised in the premises, and finding that Motion proper and one which should be granted, IT IS HEREBY ORDERED that this proceeding is stayed pending resolution of the Petition for Writ of Certiorari which defendants represent they will be filing by September 15, 1997, that defendants are to provide this court with a copy of that Petition after it has been filed, and that defendants' counsel is to inform this court, and opposing counsel, of the resolution of that Petition within twenty (20) days after that resolution by the United States Supreme Court.

Dated this 29th day of August, 1997.

BY THE COURT:
/s/ Michael Nowakowski
Michael Nowakowski
Circuit Court Judge

(2)

Supreme Court, U.S.
FILED
DEC 3 1997
CLERK

No. 97-461

In The

Supreme Court of the United States

October Term, 1997

WISCONSIN DEPARTMENT
OF CORRECTIONS, *et al.*,

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID E. LASKER
Counsel of Record
LASKER LAW OFFICES, S. C.
Tenney Plaza – Suite 800
3 South Pinckney Street
Madison, Wisconsin 53703
(608) 255-8400

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2088

QUESTION PRESENTED

Whether there is a "futility exception" to the mandate of 28 U.S.C. § 1447(c), which states: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction [over a case removed from state court], the case shall be remanded."

LIST OF PARTIES

Respondent, KEITH D. SCHACHT, is referred to as "plaintiff." He sued, as defendants, WISCONSIN DEPARTMENT OF CORRECTIONS, and the following employees of Oakhill Correctional Institution: CATHERINE J. FARREY, individually and in her official capacity as warden, CYNTHIA O'DONNELL, individually and in her official capacity as associate warden, RITA SMICK, individually and in her official capacity as personnel manager, THOMAS LALIBERTE, individually and in his official capacity as an employee, RANDALL HEPP, individually and in his official capacity as an employee, and ONE OR MORE JOHN DOES, individually and in their official capacities as employees. Defendant, Wisconsin Department of Corrections, a State agency, employs the individual defendants and operates Oakhill Correctional Institution. Although plaintiff was not granted leave to amend his pleadings to specify the unnamed defendants, he moved the district court for leave to add another Oakhill employee, Sergeant B. J. MIKKLESON.

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OPINIONS BELOW

The court of appeals opinion is reported in *Schacht v. Wisconsin Department of Corrections*, 116 F.3d 1151 (7th Cir. 1997) and reprinted in the Petition for Writ of Certiorari[1] at App. 1-6. The district court opinion is unreported and reprinted at App. 7-14.

JURISDICTION

The court of appeals decision was issued June 17, 1997. App. 1. The Petition for Writ of Certiorari was filed timely. The district court granted defendants' motion for summary judgment and entered judgment on the merits. App. 14. The court of appeals had jurisdiction under 28 U.S.C. § 1291, vacated the judgment, and directed a remand of this removed action to the state court. App. 6. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 700 (1972).

[1] Because there is no need for one, this response brief has no appendix. The appropriate documents are reprinted in the Appendix to the Petition for Writ of Certiorari (hereinafter referred to as "App.").

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 1441 provides in pertinent part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . .

28 U.S.C. § 1447(c) provides in pertinent part:

> (c) . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .

STATEMENT OF THE CASE

Schacht filed an action in Dane County Circuit Court in the State of Wisconsin alleging claims under 42 U.S.C. § 1983 for deprivation of substantive and procedural rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, when he was suspended without pay in January of 1993 and was terminated from his employment in February of 1993.

App. 1-2. Defendants removed the action to the United States District Court for the Western District of Wisconsin without objection from Schacht. App. 1-3. The district court heard and decided defendants' dispositive motions and entered an order dismissing plaintiff's claims against the state agency and the defendants in their official capacities on Eleventh Amendment grounds, denying plaintiff's request to name a new defendant, finding that the plaintiff had failed to assert a substantive due process claim, and granting summary judgment to defendants on the remaining individual capacity claims. App. 10-14. On appeal the United States Court of Appeals for the Seventh Circuit noted during oral argument that it appeared that the district court lacked subject matter jurisdiction, and the court requested that the parties file supplemental briefs on that issue. App. 3-5. On the basis of its previous holding in *Frances J. v. Wright*, 19 F.3d 337 (7th Cir. 1994), *cert. denied*, 513 U.S. 876 (1994), the court of appeals vacated the judgment of the district court and remanded the case with instructions for the district court to remand the entire action to state court. App. 6.

REASONS FOR DENYING THE WRIT

I. AS THIS COURT HAS ALREADY DETERMINED IN *INTERNATIONAL PRIMATE PROTECTION LEAGUE V. ADMINISTRATORS OF TULANE EDUCATIONAL FUND*, THERE IS NO FUTILITY EXCEPTION TO 28 U.S.C. § 1447(c).

The Court has made it clear that there is no "futility exception" to the remand mandate of 28 U.S.C. § 1447(c). *See International Primate Protection League v. Administrators*

of Tulane Educational Fund, 500 U.S. 72, 89 (1991) (noting "the literal words of § 1447(c), which, on their face, give no discretion to dismiss rather than remand an action"). Whether or not that was the holding of the Court, which may be in doubt,[2] the Court's reasoning was unmistakable and controlled the disposition of the case.

In *International Primate*, an animal rights group had brought suit in state court seeking to bar Tulane University and the National Institutes of Health (NIH) from euthanizing monkeys and from conducting subsequent autopsy research, and the NIH removed the action to federal court. *Id.* at 74-75. The Supreme Court held that the statute authorizing removal of state suits by federal officers does not permit removal by federal agencies and that the animal rights groups had standing to challenge removal. *Id.* at 77 and 79. Having concluded that NIH lacked authority to remove the suit to federal court, the Court proceeded to determine whether the case should be remanded to state court. *Id.* at 87. The Court said, "Section 1447(c) of Title 28 provides that, '[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction [over a case removed

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[2] The Court of Appeals for the Third Circuit recently followed the Court's decision in *International Primate*, although it said that the Court's unwillingness to recognize a "futility exception" had been expressed "in dicta." *Bromwell v. Michigan Mutual Insurance Company*, 115 F.3d 208, 213 (3rd Cir. 1997). However, inasmuch as the Court's handling of the issue under the facts in *International Primate* was explicit and dispositive of the case, it reasonably may be viewed as a determinative ruling on the merits of the issue, as it has been treated by the vast majority of the circuit courts of appeals. *See* Section II *infra*.

from state court], the case shall be remanded.' " *Id.* (brackets in the original). Then the Court reasoned that, "Since the district court had no original jurisdiction over this case, . . . a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c)." *Id.*

The Court noted that, "NIH asks us to affirm the Court of Appeals' dismissal of this suit on the grounds that a remand of petitioners' claims to Louisiana court would be futile." *Id.* After acknowledging the futility asserted by NIH, the Court said, "[W]e decline to speculate on the proper result." *Id.* at 89. In doing so, the Court expressly noted " 'the literal words of § 1447(c), which, on their face, give . . . no discretion to dismiss rather than remand an action.' " *Id., quoting Maine Association of Interdependent Neighborhoods v. Commissioner, Maine Department of Human Services*, 876 F.2d 1051, 1054 (1st Cir. 1989) (then-Judge Breyer writing for the court). Finally, the Court gave emphasis to the words "shall be remanded" in the wording of 28 U.S.C. § 1447(c). *See id.* ("The statute declares that, where subject matter jurisdiction is lacking, the removed case *'shall* be remanded.' " (emphasis added by the Court in the original)).

Thus, the Court made it abundantly clear that its strict interpretation of 28 U.S.C. § 1447(c) leaves no room for a "futility exception." That result is consistent with very long standing decisions of the Supreme Court. As the Court of Appeals for the Fifth Circuit said, "The subject matter jurisdiction of federal courts is limited by the Constitution and the Congress, and cannot be expanded by judicial interpretation or by the acts or consent of the parties to a case." *In re Carter*, 618 F.2d

1093, 1100 (5th Cir. 1980) (*citing American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951)), *cert. denied*, 450 U.S. 949 (1981).

The Supreme Court itself has said, "The jurisdiction of federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties," noting a long line of cases dating back to and before the Dred Scott Case. *American Fire & Casualty Co. v. Finn*, 341 U.S. at 17-18 text and n.17. In *American Fire*, the case had been removed without right from state to federal court at the request of the defendant. *Id.* at 17. The federal court lacked original jurisdiction at its inception, and up to and including the time of judgment the district court continued to be without jurisdiction. *Id.* The Court held that the defendant who removed the action was not estopped after judgment from protesting that there was no right to removal. *Id.* at 18. The Court ordered the cause remanded to the district court with directions to vacate the judgment and to remand the case to state court. *Id.* at 18-19.

American Fire and *International Primate* are both analogous to the case at bar. In a recent decision, citing numerous relevant Supreme Court decisions, the Court said:

> As explained in *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986):
>
> > "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede

> > it. *Mitchell v. Maurer*, 293 U.S. 237, 244 [55 S.Ct. 162, 165, 79 L.Ed. 338] (1934). . . . 'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purposes of correcting the error of the lower court in entertaining the suit.' *United States v. Corrick*, 298 U.S. 435, 440 [56 S.Ct. 829, 831-832, 80 L.Ed. 1263] (1936) (footnotes omitted)." *Bender*, 475 U.S., at 541, 106 S.Ct., at 1331 (brackets in original).

See also *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 72-73, 104 S.Ct. 373, 375-376, 78 L.Ed.2d 58 (1983) (per curiam) (vacating judgment below where Court of Appeals had ruled on the merits although case had become moot).

Arizonans for Official English v. Arizona, 117 S.Ct. 1055, 1071-1072 (1997). The Court of Appeals for the Seventh Circuit has handled the instant action in a manner consistent with those clear precedents from the Supreme Court.

II. MOST OF THE CIRCUIT COURTS OF APPEALS ADHERE TO THE RULING IN *INTERNATIONAL PRIMATE*, AND PETITIONERS RELY UPON A FEW ABERRANT COURT OF APPEALS DECISIONS WHICH PREDATE OR FAIL TO CONSIDER *INTERNATIONAL PRIMATE*.

In the case at bar the Seventh Circuit correctly followed *International Primate* and its own sentinel case on the subject, *Frances J. v. Wright*, 19 F.3d 337 (7th Cir. 1994).

See Schacht v. Wisconsin Department of Corrections, 116 F.3d 1151 (7th Cir. 1997) (App. 1-6). The court acknowledged defendants' argument that "remand would be futile and would result in a waste of judicial resources." *Id.* at 1153 (App. 5). The court countenanced the same arguments made by the defendants as petitioners to this Court:

> Specifically, the defendants contend that if we remand, the state court will simply dismiss the official capacity claims and the claims against the WDOC for failing to state a claim on which relief may be granted, or on grounds of sovereign immunity, and duplicate the analysis the district court devoted to the remaining claims. See *Lindas v. Cady*, 441 N.W.2d 705, 709 (Wis. 1989) (noting that "states are not 'persons' within the meaning of sec. 1983"). See also *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1069 (1997) (noting that "sec. 1983 actions do not lie against a State").

Id. Then, relying upon the most recent applicable decisions from this Court, the court said:

> Even if the defendants have accurately forecast the fate of this case on remand, we are not free to disregard a jurisdictional defect. See *Arizonans*, ___ U.S. at ___, 117 S.Ct. at 1071. Contrary to their suggestion, there is no "futility exception" to § 1447(c). The Supreme Court noted that the literal words of § 1447(c) leave no room for such an exception. See *Primate Protection League v. Tulane Educational Fund*, 500 U.S. 72, 89, 111 S.Ct. 1700, 1710, 114 L.Ed. 2d 134 (1991). See also 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded.") (Emphasis added).

Id. The disposition of the instant action by the court below – rejecting the same arguments made by petitioners in the Petition for Writ of Certiorari – was consistent with all applicable precedents from this Court. A contrary decision would have been contrary to the applicable or analogous decisions of the Supreme Court.

Since the decision in *International Primate*, petitioners' proposed "futility exception" has been expressly rejected by the circuit courts of appeals for the Third, Fourth, and Seventh Circuits. *See Bromwell v. Michigan Mutual Insurance Company*, 115 F.3d 208, 214 (3rd Cir. 1997) ("[W]e hold that when a federal court has no jurisdiction of a case removed from a state court, it must remand and not dismiss on the ground of futility."); *Roach v. West Virginia Regional Jail and Correctional Facility Authority*, 74 F.3d 46, 49 (4th Cir. 1996) (noting that "the futility of a remand to the West Virginia state court does not provide an exception to the plain meaning of § 1447(c)"); *Schacht*, 116 F.3d at 1153 (App. 5) (holding that "there is no 'futility' exception to § 1447(c)"); *Gorka By Gorka v. Sullivan*, 82 F.3d 772, 774-775 (7th Cir. 1996) (following the holding in *Frances J.* that the entire case should be remanded, if the federal court does not have original jurisdiction because of a claim barred by sovereign immunity); *International College of Surgeons v. City of Chicago, Illinois*, 91 F.3d 981, 993-994 (7th Cir. 1996) ("removal is proper only if the action originally could have been brought in the district court"), *cert. granted*, ___ U.S. ___, 117 S.Ct. 1424 (1997); *Frances J. v. Wright*, 19 F.3d 337, 341 (7th Cir. 1994) ("if even one claim in an action is jurisdictionally barred from the federal court by a state's sovereign immunity, . . . then as a consequence of § 1447(a), the whole action cannot be

removed to federal court."), *cert. denied*, 513 U.S. 876 (1994); *Smith v. Wisconsin Department of Agriculture, Trade and Consumer Protection*, 23 F.3d 1134, 1139 (7th Cir. 1994) ("[T]he Supreme Court has squarely rejected the argument that there is an implicit 'futility exception' hidden behind the plain meaning of § 1447(c)"). The Tenth Circuit also has expressly rejected the proposed "futility exception" in an unpublished opinion. *See Jepsen v. Texaco, Inc.*, 68 F.3d 483, 1995 WL 607630, at *3 (10th Cir. 1995) (noting that the Supreme Court has expressly rejected a futility exception in *International Primate*).

Additionally, in a case decided prior to *International Primate* and explicitly noted in *International Primate*, the First Circuit expressly refused to adopt the futility exception, stating that "the fact that we believe a certain legal result *unlikely*, as a matter of state law, is not sufficient grounds for reading an exception into the absolute statutory words 'shall be remanded'." *Maine Association of Interdependent Neighborhoods*, 876 F.2d at 1055 (1st Cir. 1989) (emphasis in the original). The Second Circuit also has recognized that such an exception probably does not exist in light of the decision in *International Primate*. *Barbara v. New York Stock Exchange*, 99 F.3d 49, 56 n.4 (2nd Cir. 1996).

Only the Fifth and Ninth Circuits have recognized the proposed "futility exception." *See Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990) (allowing dismissal because the state court would be bound by the federal appellate court's ruling that defendants had insufficient contacts with Louisiana to satisfy the federal due process clause requisites for personal jurisdiction); *Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1991) (ruling

that dismissal was appropriate where remand was futile). However, both *Asarco* and *Bell* were decided prior to this Court's decision in *International Primate*.[3]

In the Petition for Writ of Certiorari petitioners argue:

> [T]he appellate court should have recognized that, as a non-jurisdictional matter, § 1983 claims simply cannot be made against States and turned to the merits of the appeal. This was the procedure followed by the Ninth Circuit Court of Appeals in *Kruse v. State of Hawai'i*, 68 F.3d 331 (9th Cir. 1995) which, sharply criticizing the rationale in *Frances J.*, held that district courts should dismiss removed claims to which Eleventh Amendment immunity might apply by focusing on this definitional analysis rather than any jurisdictional questions. 68 F.3d at 334.

Petition at 18-19. *Kruse*, in rejecting the logic of the Seventh Circuit in *Frances J.*, adopted what it called "the better-reasoned approach of the Sixth Circuit" in *Henry v. Metropolitan Sewer District*, 922 F.2d 332 (6th Cir. 1990). *See* 68 F.3d at 334-335. However, the decision in *Henry* also predated this Court's decision in *International Primate*. The *Kruse* decision does not even mention *International Primate*, which was decided more than four years before *Kruse*.

The flaw in petitioners' argument and in the approach taken by the Ninth Circuit in *Kruse* is related to

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[3] *Asarco* was decided September 14, 1990, and *Bell* was decided January 8, 1991. *International Primate* was decided May 20, 1991.

the reason the Supreme Court declined "to speculate on the proper result" in *International Primate*. 500 U.S. at 89. That is, the Court lacked subject matter jurisdiction, which was necessary as a predicate for undertaking the inquiry into the alleged futility. As the Seventh Circuit has said, "[T]he point of § 1447(c) is that a federal court does not have the authority to dismiss a claim over which it never had jurisdiction in the first instance. The merits of the state law claim are therefore irrelevant to this determination." *Smith*, 23 F.3d at 1339 n.10. That conclusion reflects the fact that " '[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . ' " *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (*quoting Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981)).

In addressing the subject matter of the issue raised in the Petition, this Court and the federal courts generally make reference to "the literal words of § 1447(c)" and specifically to the phrase "shall be remanded." *See, e.g., International Primate*, 500 U.S. at 89. In addressing the specific argument of petitioners and the aberrant approach of the Ninth Circuit in *Kruse*, however, respondent focuses upon other words in the sentence, "If at any time before final judgment *it appears that* the district court lacks subject matter jurisdiction, *the case* shall be remanded." (Emphasis added.) The literal words of § 1447(c) on their face support the interpretation that there is no futility exception. First, § 1447(c) states that the case shall be remanded if *it appears that* the district court lacks subject matter jurisdiction, implying that the case shall be remanded if the problem of subject matter jurisdiction appears to exist – not that there shall be a

detailed inquiry into the matter by the federal court before remand occurs. Secondly, § 1447(c) provides that, when it appears that the district court lacks subject matter jurisdiction, *the case* shall be remanded, implying that the entire action shall be remanded – not specific claims or other subparts of "the case." Indeed, one need not look further than the literal words of 28 U.S.C. § 1447(c) to see that the Petition should be denied.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

David E. Lasker, Esq.
Counsel of Record
Lasker Law Offices, S.C.

Attorneys for Respondent
Tenney Plaza – Suite 800
3 South Pinckney Street
Madison, Wisconsin 53703
Telephone: (608) 255-8400
Facsimile: (608) 255-8410

Supreme Court, U.S.
FILED
DEC 23 1997
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No. 97-461

In The

Supreme Court of the United States

October Term, 1997

WISCONSIN DEPARTMENT OF CORRECTIONS,
et al.,

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

On Petition for Writ of Certiorari
to the United State Court of Appeals
for the Seventh Circuit

REPLY TO
BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

JAMES E. DOYLE
Attorney General

RICHARD BRILES MORIARTY
Assistant Attorney General
Wisconsin Department of Justice
123 West Washington Avenue
Madison, Wisconsin 53707-7857
(608) 267-2796

11pp

REPLY AS TO QUESTION PRESENTED

Without explanation, Schacht represents the question presented to be far narrower than the one articulated by defendants . *Compare* Opposing brief, p. i *with* Petition, p. i. He downplays the question presented by ignoring defendants' two main arguments and responding as if the petition were instead limited to arguing that there is a "futility exception" to 28 U.S.C. § 1447. The petition correctly stated the question presented.

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No. 97-461

In The

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WISCONSIN DEPARTMENT OF CORRECTIONS,
et al.,

Petitioners,

v.

KEITH D. SCHACHT,

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On Petition for Writ of Certiorari
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REPLY TO
BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT

After declining to respond on his own, the Court required Schacht, under S.Ct.R. 15.1, to respond to the petition. (12/3/97 letter from Clerk Suter to Attorney Lasker.) Schacht chose an intriguing strategy. Rather

than address defendants' two main arguments (*see* Petition, pp. 6 and 14), his response assumes defendants restricted themselves to arguing only for a "futility exception" under 28 U.S.C. § 1447 (*see* Petition, pp. 20-21).

He responds as if defendants conceded both that the district court lacked any subject matter jurisdiction over this removed action and that, unless a "futility exception" exists under 28 U.S.C. § 1447, the appellate court decision was correct. The petition instead argued that the district court had subject matter jurisdiction over this removed action. Petition, pp. 6-14. It also argued that, regardless, the appellate court erred since a definitional bar to those of Schacht's claims subject to jurisdictional concerns rendered the court's *sua sponte* inquiry unnecessary and its mandate a serious blow to our federalist system. Petition, pp. 14-24. Under this Court's rules, both arguments are properly before the Court since they were pressed, and passed on, below and were fairly included in the petition. Lebron v. Nat'l R. Passenger Corp., 513 U.S. 374, 379 (1995); S.Ct.R. 14.1.

In analyzing the Question Presented and these two main arguments, and in response to the appellate court reasoning, defendants did raise and discuss the subissue of whether a "futility exception" exists under 28 U.S.C. § 1447. (Petition, pp. 20-21; App. 5.) Schacht's opposing brief addresses only this subissue.

This Court, by requiring Schacht, under S.Ct.R. 15.1, to file an opposing brief, directed him to comply with S.Ct.R. 15.2 which states, in relevant part:

> **2.** . . . In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. . . .

S.Ct.R. 15.2. Beyond responding to defendants' analysis of the "futility exception" subissue on pages 20 and 21 of the petition, Schacht made no attempt to "point out" or "address" any "perceived misstatement of fact or law" in the petition. S.Ct.R. 15.2.

By ignoring defendants' main arguments, he risked being precluded, if the petition is granted, from challenging those arguments in briefing on the merits. *E.g.*, Howlett v. Rose, 496 U.S. 356, 381, n.24 (1990) (declining, on the merits, to reach a "contention [which] was not presented in respondent's brief in opposition to the petition for certiorari"). Considering the ratio of petitions filed to petitions granted, the benefits of downplaying the importance of a case at the petition level may appear to outweigh that risk. The Court is entitled, nonetheless, to assume that, if Schacht had any viable points to make in opposition to defendants' main arguments, he would have made those points.

Because Schacht mustered **no** opposition to defendants' arguments other than on the "futility exception" subissue, the Court could, if the petition is granted, limit him to the opposing arguments he has already made. *E.g.*, Howlett, 496 U.S. at 381, n.24. Defendants submit that the issues articulated in the petition are too important to be resolved on the merits in that fashion (*e.g.*, Ohio v. Robinette, 519 U.S. ___, 117 S.Ct. 467, 476, 136 L.Ed.2d 347 (1996) (though respondent did not address an issue in brief opposing certiorari, it was briefed on the merits and was "'predicate to an intelligent resolution'" of the question presented such that Court proceeded to decide it), and would instead Schacht, in his

brief on the merits, to try to defend the appellate court decision by whatever arguments he can develop.

This Court, not respondents, decide which, among issues properly presented at the petition level, are to be resolved. *E.g.*, Lebron, 513 U.S. at 379; United States v. Williams, 504 U.S. 36, 40-45 (1992); United States v. Wells, 519 U.S. ___, 117 S.Ct. 921, 925, 137 L.Ed.2d 107 (1997). "'The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions . . . would thwart this system.'" Lebron, 513 U.S. at 379 *quoting* Taylor v. Freeland & Kronz, 503 U.S. 638, 646 (1992). A respondent may not shield faulty appellate court reasoning from an inquiry properly made in a petition by ignoring the inquiry.

Ironically, Schacht demonstrates that, if defendants had themselves restricted the petition to presenting only the "futility exception" subissue, that single question would merit resolution by the Court. The petition, supplemented by Schacht's opposing brief, reveals that the circuits are divided on this subissue and may well be misinterpreting this Court's decision in Primate Protection League v. Tulane, 500 U.S. 72 (1991). Opposing brief, pp. 7-13.

Schacht minimizes this division by asserting that the last word from the Court of Appeals for the Fifth Circuit preceded Primate Protection League in Ascarco, Inc. v. Glenara, Ltd., 912 F.2d 784, 787 (5th Cir. 1990). Opposing brief, pp. 10-11, text and n. 3. The petition noted, however, that in Primate Protection League itself, after remand from this Court, the Fifth Circuit concluded there **was** a "futility exception" in removal cases. In re Adm'rs of the Tulane Educational Fund, 954 F.2d 266 (5th Cir. 1992), *on remand*, Primate Protection League v. Tulane, 1992 WL 329555 (E.D.La. 1992), *aff'd* 22 F.3d 1094 (5th Cir. 1994), *reh'g and reh'g en banc denied*, 25 F.3d 1046 (5th Cir. 1994), *cert. denied*, 513 U.S. 1032 (1994). *See* Petition, pp. 20-21 and quotation from In re Adm'rs of

the Tulane Educational Fund, 954 F.2d at 270. Though the Court having declined to review that subsequent Fifth Circuit decision merely means that, with the Court exercising its sound discretion, fewer than four Justices voted in favor of review (*e.g.*, Maryland v. Baltimore Radio Show, 338 U.S. 912, 917-18 (1950), it diminishes the potential that Primate Protection League precluded any futility exception in removal cases.

Defendants submit that the Third Circuit correctly viewed these comments in Primate Protection League as *dicta* which merely raised, rather than answered, questions. *E.g.*, Bromwell v. Michigan Mutual Insurance Co., 115 F.3d 208, 214 (3rd Cir. 1997) (Primate Protection League "in *dicta*, expressed a reluctance to recognize" a futility exception in removal cases). By contrast, the Fourth and Seventh Circuits misread those comments as a blanket holding that there can never be a "futility exception" to 28 U.S.C. § 1447. *E.g.*, Roach v. West Virginia Regional Jail and Correctional Facility Authority, 74 F.3d 46, 49 (4th Cir. 1996); Intern. College of Surgeons v. City of Chicago, 91 F.3d 981 (7th Cir. 1996), *cert. granted*, 117 S.Ct. 1424 (1997). A district court in the Fourth Circuit recently expressed dismay at having to hew to Roach in remanding to State court, as here, claims which would unquestionably be dismissed in any court. Lowery v. Prince George's County, Md., 960 F.Supp. 952, 957-59 (D.Md. 1997).

Schacht's assertion that other circuits have held there is no futility exception in removal cases is not supported by his citations. He cites Barbara v. New York Stock Exchange, 99 F.3d 49, 56, n. 4 (2nd Cir. 1996) as if it held there "probably" was no futility exception in removal cases in light of Primate Protection League even though Barbara expressly noted it was **not** necessary to reach, and was not reaching, that question. 99 F.3d at 56, n. 4. He also improperly cites an "unpublished" opinion by

the Tenth Circuit as precedent. Opposing brief, p. 10. *See* Tenth Circuit R. 36.3.

Though the confusion over the "futility exception" subissue would itself justify granting the petition, defendants identified it as a secondary matter because resolution of this case, if the petition is granted, will instead likely turn on the main arguments identified in the petition such that this subissue may need be reached. That Schacht mustered no opposition to defendants' main arguments is a remarkably revealing commentary on how flawed the appellate court reasoning is and how important it is to assure the appellate court decision does not continue to disrupt proper relations between fellow sovereigns by allowing plaintiffs to turn the shield of Eleventh Amendment immunity into a sword.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

JAMES E. DOYLE
Attorney General

RICHARD BRILES MORIARTY
Assistant Attorney General
State Bar No. 1017190

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796

No. 97-461

In The

Supreme Court of the United States

October Term, 1997

WISCONSIN DEPARTMENT OF CORRECTIONS, *et al.*

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

JAMES E. DOYLE
Attorney General
RICHARD BRILES MORIARTY*
Assistant Attorney General
Wisconsin Department of Justice
123 West Washington Avenue
Madison, Wisconsin 53707
Telephone: (608) 267-2796
Counsel for Petitioners

DAVID E. LASKER*
Lasker Law Offices, S.C.
Suite 800
3 South Pinckney Street
Madison, Wisconsin 53703
Telephone: (608) 255-8400
Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED SEPTEMBER 12, 1997
CERTIORARI GRANTED JANUARY 16, 1998

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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

KEITH D. SCHACHT,
Plaintiff,

vs.

COMPLAINT
Case No. 95CV3087
Case Classification Type:
Personal Injury - Other:
Case Classification No: 30107

WISCONSIN DEPARTMENT OF CORRECTIONS, KATHRYN J. FARREY, individually and in her official capacity as warden of Oakhill Correctional Institution, CYNTHIA O'DONNELL, individually and in her official capacity as associate warden of Oakhill Correctional Institution, RITA SMICK, individually and in her official capacity as personnel manager for Oakhill Correctional Institution, THOMAS LALIBERTE, individually and in his official capacity as an employee of Oakhill Correctional Institution, RANDALL HEPP, individually and in his official capacity as an employee of Oakhill Correctional Institution, and ONE OR MORE JOHN DOES, individually and in their official capacities as employees of Oakhill Correctional Institution,
Defendants.

NATURE OF ACTION

101. This civil action is brought to redress the violation of the plaintiff's right secured by the Fourteenth Amendment to the United States Constitution to be free from deprivations of his liberty or property without due process of law which occurred on or about February 19, 1993, when he was wrongfully discharged from his employment at Oakhill Correctional Institution.

JURISDICTION AND VENUE

201. This court has jurisdiction over this action pursuant to §§801.03 and 801.04, Wis. Stats.

202. Dane County is the proper venue for this action pursuant to §§801.50, Wis. Stats., because the claim arose in this county.

PARTIES

A. Plaintiff

301. The plaintiff, Keith D. Schacht, is an adult male, who resided in Madison, Wisconsin, County of Dane, State of Wisconsin, at the time the claim arose. His current address is 220 Camilla Lane, Green Bay, Wisconsin, 54311-6890.

B. Defendants

302. Defendant Wisconsin Department of Corrections is an agency of the State of Wisconsin.

303. Defendant Kathryn J. Farrey is an adult female resident of the State of Wisconsin and is the warden of Oakhill Correctional Institution, which is located at 5212 Highway M, Oregon, Wisconsin, 53575-0238.

304. Defendant Cynthia O'Donnell is an adult female resident of the State of Wisconsin and is the associate warden of Oakhill Correctional Institution, which is located at 5212 Highway M, Oregon, Wisconsin, 53575-0238.

305. Defendant Rita Smick is an adult female resident of the State of Wisconsin and is the personnel manager of Oakhill Correctional Institution, which is located at 5212 Highway M, Oregon, Wisconsin, 53575-0238.

306. Defendant Thomas Laliberte is an adult male resident of the State of Wisconsin and is a captain employed by Oakhill Correctional Institution, which is located at 5212 Highway M, Oregon, Wisconsin, 53575-0238.

307. Defendant Randall Hepp is an adult male resident of the State of Wisconsin and is a lieutenant employed by Oakhill Correctional Institution, which is located at 5212 Highway M, Oregon, Wisconsin, 53575-0238.

308. Defendant or defendants John Doe are those officials, agents or employees of defendant Wisconsin Department of Corrections whose acts or omissions are at issue in this case and whose names and identities are not known to the plaintiff at this time.

ALLEGATIONS OF FACT AS TO ALL CAUSES OF ACTION

401. Plaintiff began employment with the Wisconsin Department of Corrections on or about October 25, 1982, when he was hired as a correctional officer for the Wisconsin Resource Center. His probationary period ended approximately April 25, 1983.

402. Plaintiff received only favorable job performance reviews while employed at the Wisconsin Resource Center.

403. On approximately June 12, 1983, plaintiff was transferred to a position as a correctional officer at Green Bay Correctional Institution in Green Bay, Wisconsin. His probationary period ended approximately December 11, 1983.

404. Plaintiff received only favorable performance reviews in that position.

405. On approximately December 20, 1987, plaintiff was transferred to a position as a correctional officer at Oakhill Correctional Institution in Oregon, Wisconsin. His probationary period ended approximately June 19, 1988.

406. Plaintiff received only favorable performance reviews in that position until the date he was discharged.

407. While employed as a correctional officer at Oakhill Correctional Institution, plaintiff engaged occasionally in a sideline business of selling various foodstuffs, such as seafood and pizzas to fellow employees.

408. Whenever a fellow correctional officer purchased seafood, plaintiff would customarily accompany the order with some complimentary butter.

409. On or about January 20, 1993, plaintiff had brought some butter into the Oakhill Correctional Institution, intending to give it to a fellow officer who had earlier purchased seafood from the plaintiff.

410. The plaintiff had intended to give this butter to his fellow co-worker in the parking lot before their work shifts began, but he did not have the opportunity to do so. Instead, the plaintiff took the butter inside the Oakhill Correctional Institution with him.

411. At the end of his shift, on the morning of January 21, 1993, the plaintiff wrapped the butter in two plastic garbage bags, which he took from a trash can inside

the Oakhill Correctional Institution. He then placed the wrapped butter into his backpack and prepared to leave work.

412. As the plaintiff was leaving work, defendant Thomas Laliberte detained the plaintiff and asked him to empty his backpack in the presence of two fellow employees of Oakhill Correctional Institution.

413. In addition to the wrapped butter, the search revealed miscellaneous personal items including a three ounce tube of Colgate toothpaste, two black pens, and three red pens.

414. Defendant Laliberte wrongfully and erroneously determined that the butter, the toothpaste, and the pens were State property, when in fact each of those items was the property of the plaintiff.

415. Without making an adequate or a reasonable investigation, Defendant Laliberte immediately suspended the plaintiff without pay.

416. In reckless disregard for the plaintiff's reputation, the defendants conducted an inquiry into the matter in such a way as to disseminate the wrongful accusations of theft against the plaintiff throughout Oakhill Correctional Institution, thereby damaging the plaintiff's good name and reputation.

417. On January 23, 1993, and again on February 4, 1993, Lois Bangs, a fellow corrections officer at Oakhill Correctional Institution who lived at plaintiff's residence, was interrogated by defendant Laliberte regarding the property found in the plaintiff's backpack.

418. Lois Bangs confirmed the plaintiff's version of events, including the fact that the butter was brought from the plaintiff's home to give to a fellow employee, and the fact that the pens and toothpaste also were the plaintiff's own personal property.

419. On February 4, 1993, and again on February 12, 1993, the plaintiff was interrogated by defendant Laliberte and defendant Hepp.

420. Throughout their "investigation" and interrogations of the plaintiff, defendants Laliberte and

Hepp maliciously and recklessly disregarded the truth surrounding the erroneous allegations against the plaintiff.

421. During these interrogations, the plaintiff was repeatedly subjected to harassment in the form of harangues and false accusations from defendants Laliberte and Hepp.

422. The interrogations conducted by defendants Laliberte and Hepp were not reasonably calculated to discern the truth, but were instead a part of a malicious attempt to wrongfully terminate the plaintiff's employment.

423. On February 17, 1993, defendants Laliberte and Hepp called the plaintiff into a so-called "pre-disciplinary hearing." There, defendants Laliberte and Hepp recklessly and maliciously made the erroneous determination that the plaintiff had stolen State-owned or issued property, in violation of Work Rule 3, and had failed to provide accurate and complete information when required by management, in violation of Work Rule 7.

424. The February 17, 1993 meeting between defendants Laliberte and Hepp and the plaintiff, while held under the guise of a "predisciplinary hearing" was not a bona fide hearing. In fact it was part of the effort by defendants Laliberte and Hepp to fabricate a case for wrongfully terminating the plaintiff.

425. Defendant Laliberte and Hepp conducted all of the investigatory hearings, spearheaded the investigation against the plaintiff, and made the final determination that the plaintiff had violated the Work Rules, when they knew or should have known the plaintiff was innocent of any wrongdoing which could reasonably justify disciplinary action.

426. The wrongful termination of the plaintiff was motivated by factors including, but not limited to, prior reasonable criticisms that the plaintiff had made in a reasonable manner expressing his disagreement with the management style of defendants Farrey, O'Donnell, and Laliberte.

427. On February 18, 1993, defendant Kathryn J. Farrey wrongfully terminated the plaintiff's employment,

although she knew or should have known that there was no reasonable basis for doing so.

428. The termination of the plaintiff's employment was the result of the defendants' wrongful actions knowingly taken in concert with each other.

429. After the plaintiff was wrongfully terminated from his position at Oakhill Correctional Institution, the defendants disseminated erroneous and defamatory information to third parties which damaged the plaintiff's reputation and severely impaired his ability to secure subsequent employment.

DAMAGES

501. As the direct and proximate result of the wrongful actions of the defendants, the plaintiff has been caused to suffer (1) a deprivation of rights and privileges guaranteed to the plaintiff by the Fourteenth Amendment to the United States Constitution, namely, a property interest in continued public employment and a liberty interest in his good name and reputation, (2) mental anguish and despair, (3) humiliation and ridicule, (4) stigmatization, embarrassment and defamation, (5) loss of earnings, and (6) loss of earnings capacity, all to his damage in a sum exceeding $5,000.00 to be determined by the court.

VIOLATIONS OF LAW

601. Under the facts of this case, the plaintiff has a claim for the deprivation of a constitutionally protected property interest without due process of law, under color of state law, contrary to 42 U.S.C. §1983.

602. The plaintiff likewise has a claim for deprivation of a constitutionally protected liberty interest without due process of law, under color of state law, contrary to 42 U.S.C. §1983.

DEMAND FOR A JURY TRIAL

701. The plaintiff demands a trial by jury as to all issues in this action.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff prays that the court grant him judgment against the defendants, jointly and severally, awarding him:

a. Compensatory damages in an amount deemed just by the court;

b. Punitive damages against the individual defendants in amounts deemed just by the court;

c. A reasonable attorneys' fee, including litigation costs; and

d. Such other and further relief as the court deems just.

[date and attorney subscription omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEITH D. SCHACHT,
Plaintiff,

v.

Case No. 96 C 0122 S
Dane Cty. Case No. 95 CV 3087

WISCONSIN DEPARTMENT OF CORRECTIONS, KATHRYN J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE, RANDALL HEPP and ONE OR MORE JOHN DOES,
Defendants.

PETITION AND NOTICE OF REMOVAL

Defendants, Wisconsin Department of Corrections, Catherine J. Farrey (misnamed as Kathryn J. Farrey in complaint), Cynthia O'Donnell, Rita Smick, Thomas Laliberte and Randall Hepp, (the named defendants) by their attorneys, James E. Doyle, Attorney General, and Richard Briles Moriarty, Assistant Attorney General, hereby petition for and give notice of removal of this Dane County Circuit Court civil action to the United States District Court for the Western District of Wisconsin. The grounds for this petition and notice are as follows:

1. A civil action was commenced and is now pending in the Circuit Court for Dane County, Wisconsin, brought by the plaintiff against the named defendants. That complaint also names "one or more John Does" as possible defendants. Copies of the Summons and Complaint served on the named defendants are attached to and made part of this petition and notice.

2. Plaintiff seeks to assert violations, within Dane County, Wisconsin, of alleged rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

3. Pursuant to 28 U.S.C. §§ 1331 and 1343, this court has jurisdiction and venue over claimed violations,

within Dane County, Wisconsin, of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

4. Pursuant to 28 U.S.C. § 1441(b), removal of these claims is mandatory upon compliance with 28 U.S.C. § 1446 as herein accomplished.

5. Copies of the Summons and Complaint were served upon the named defendants on January 24, 1996 and later dates.

WHEREFORE, the named defendants represent they have complied with the provisions of law and give notice this action stands removed from the Circuit Court for Dane County, Wisconsin, to the United States District Court for the Western District of Wisconsin.

[date and attorney subscription omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEITH D. SCHACHT,
Plaintiff,

v.

Case No. 96 C 0122 S
Dane Cty. Case No. 95 CV 3087

WISCONSIN DEPARTMENT OF CORRECTIONS, KATHRYN J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE, RANDALL HEPP and ONE OR MORE JOHN DOES,
Defendants.

ANSWER AND DEFENSES

Defendants, Wisconsin Department of Corrections, Catherine J. Farrey (misnamed as Kathryn J. Farrey in complaint), Cynthia O'Donnell, Rita Smick, Thomas Laliberte and Randall Hepp, (the named defendants) by their attorneys, James E. Doyle, Attorney General, and Richard Briles Moriarty, Assistant Attorney General, respond to the Complaint filed by plaintiff, Keith Schacht, (Schacht) as follows:

101. The named defendants deny the factual allegations of paragraph 101 and demand strict proof.

201. The named defendants deny the factual allegations of paragraph 201 that the Circuit Court of Dane County, by virtue of §§ 801.03 and 801.04, had jurisdiction of the claims under the United States Constitution, as amended, which Schacht seeks to make in the Complaint and demand strict proof.

202. The named defendants admit the factual allegations of paragraph 202 that the claims Schacht sought to make in the Complaint arose in Dane County, Wisconsin.

301. The named defendants admit the factual allegations of paragraph 301.

302. The named defendants admit the factual allegations of paragraph 302.

303. The named defendants admit the factual allegations of paragraph 303.

304. The named defendants deny the factual allegations of paragraph 304 that defendant O'Donnell is now associate warden at Oakhill and demand strict proof. The named defendants affirmatively state defendant O'Donnell is now associate warden of Waupun Correctional Institution and was associate warden at Oakhill when the claim arose.

305. The named defendants deny the factual allegations of paragraph 305 that defendant Smick is now personnel manager at Oakhill and demand strict proof. The named defendants affirmatively state that defendant Smick is now the institution complaint manager at Oakhill and was personnel manager at Oakhill when the claim arose.

306. The named defendants admit the factual allegations of paragraph 306.

307. The named defendants admit the factual allegations of paragraph 307.

308. The named defendants do not have sufficient knowledge or information to admit or deny the factual allegations of paragraph 308, since the named defendants can not determine the person or persons to whom Schacht may be referring, and demand strict proof.

401. The named defendants admit the factual allegations of paragraph 401.

402. The named defendants do not have sufficient knowledge or information to admit or deny the factual allegations of paragraph 402, since the named defendants can not determine what Schacht means in using the term "favorable", and demand strict proof.

403. The named defendants admit the factual allegations of paragraph 403.

404. The named defendants do not have sufficient knowledge or information to admit or deny the factual allegations of paragraph 404, since the named defendants

can not determine what Schacht means in using the term "favorable", and demand strict proof.

405. The named defendants deny the factual allegations of paragraph 405 that he was "transferred" to a position at Oakhill and demand strict proof. The named defendants affirmatively state that Schacht resigned from a Correctional Officer II position at Green Bay Correctional Institution to accept a promotion to a Correctional Officer III position at Oakhill. The named defendants admit the remaining factual allegations of paragraph 405.

406. The named defendants do not have sufficient knowledge or information to admit or deny the factual allegations of paragraph 406, since the named defendants can not determine what Schacht means in using the term "favorable", and demand strict proof.

407. The named defendants do not have sufficient information or knowledge to admit or deny the factual allegations of paragraph 407 and demand strict proof.

408. The named defendants do not have sufficient information or knowledge to admit or deny the factual allegations of paragraph 408 and demand strict proof.

409. The named defendants deny the factual allegations of paragraph 409 and demand strict proof.

410. The named defendants do not have sufficient knowledge or information to admit or deny the factual allegations of paragraph 410 and demand strict proof.

411. The named defendants do not have sufficient knowledge or information to admit or deny the implied factual allegations of paragraph 411 that Schacht had brought "the butter" into the institution and demand strict proof. The named defendants admit the factual allegations of paragraph 411 that, at some time after entering the institution on January 20, 1993 and before leaving the institution on January 21, 1993, Schacht wrapped the butter in two plastic garbage bags owned by the State of Wisconsin and placed the wrapped butter into his backpack. The named defendants do not have sufficient information or knowledge to admit or deny the factual allegations of paragraph 411 about when, during the time he was inside the institution, Schacht wrapped the butter

in the garbage bags and put the butter in his backpack, or whether Schacht obtained the garbage bags from a trash can within Oakhill, and demand strict proof.

412. The named defendants admit the factual allegations of paragraph 412.

413. The named defendants deny the factual allegations of paragraph 413 that the "three ounce tube of Colgate toothpaste, two black pens and three red pens" were "personal items", as opposed to items owned by the State of Wisconsin, and demand strict proof. The named defendants admit the factual allegations of paragraph 413 that the wrapped butter, a three ounce tube of Colgate toothpaste, two black pens and three red pens were inside Schacht's backpack. The named defendants admit the factual allegation of paragraph 413 that, by contrast with other "miscellaneous personal items" Schacht may have had inside his backpack, the "wrapped butter" inside Schacht's backpack was not a "personal item" owned by Schacht.

414. The named defendants deny the factual allegations of paragraph 414 and demand strict proof.

415. The named defendants deny the factual allegations of paragraph 415 and demand strict proof.

416. The named defendants deny the factual allegations of paragraph 416 and demand strict proof.

417. The named defendants deny the factual allegations of paragraph 417 that Lois Bangs was "interrogated by defendant Laliberte" and demand strict proof. The named defendants affirmatively state that, on both January 23 and February 4, 1993, Lois Bangs was asked questions by two management representatives, with a union representative present and that, on each occasion, defendant Laliberte was one of the two management representatives present. The named defendants admit the remaining factual allegations of paragraph 417.

418. The named defendants deny the factual allegations of paragraph 418 and demand strict proof.

419. The named defendants admit the factual allegations of paragraph 419.

420. The named defendants deny the factual allegations of paragraph 420 and demand strict proof.

421. The named defendants deny the factual allegations of paragraph 421 and demand strict proof.

422. The named defendants deny the factual allegations of paragraph 422 and demand strict proof.

423. The named defendants deny the factual allegations of paragraph 423 and demand strict proof.

424. The named defendants deny the factual allegations of paragraph 424 and demand strict proof.

425. The named defendants deny the factual allegations of paragraph 425 and demand strict proof.

426. The named defendants deny the factual allegations of paragraph 426 and demand strict proof.

427. The named defendants deny the factual allegations of paragraph 427 and demand strict proof. The named defendants affirmatively state that defendant Farrey formally notified Schacht, by letter dated February 18, 1993, that his employment was terminated effective February 19, 1993.

428. The named defendants deny the factual allegations of paragraph 428 and demand strict proof.

429. The named defendants deny the factual allegations of paragraph 429 and demand strict proof.

501. The named defendants deny the factual allegations of paragraph 501 and demand strict proof.

601. The named defendants deny the factual allegations of paragraph 601 and demand strict proof.

602. The named defendants deny the factual allegations of paragraph 602 and demand strict proof.

701. The named defendants perceive no factual allegations in paragraph susceptible to admission or denial.

DEFENSES

As and for defenses, the named defendants state as follows:

A. The eleventh amendment to the United States Constitution, and the doctrine of sovereign immunity, bars any claim under 42 U.S.C. § 1983 against defendant Wisconsin Department of Corrections.

B. The eleventh amendment to the United States Constitution, and the doctrine of sovereign immunity, bars any claim under 42 U.S.C. § 1983 against any of the named defendants in their official capacities.

C. To the extent Schacht seeks to assert any claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, he has failed to state a claim of relief against defendant Wisconsin Department of Corrections.

D. To the extent Schacht seeks to assert any claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, he has failed to state a claim of relief against defendant Farrey.

E. To the extent Schacht seeks to assert any claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, he has failed to state a claim of relief against defendant O'Donnell.

F. To the extent Schacht seeks to assert any claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, he has failed to state a claim of relief against defendant Smick.

G. To the extent Schacht seeks to assert any claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, he has failed to state a claim of relief against defendant Laliberte.

H. To the extent Schacht seeks to assert any claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, he has failed to state a claim of relief against defendant Hepp.

I. The conduct Schacht alleges to have been taken by the named defendants did not violate any clearly established and sufficiently particularized federal statutory or constitutional rights of which they reasonably would have known pursuant to *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and each of the named defendants are entitled to qualified immunity on the federal constitutional claims Schacht seeks to make against them.

J. Even if [the] named defendants did not comply with the provisions of the Due Process Clause of the

Fourteenth Amendment to the United States Constitution in the ad[ver]se employment actions plaintiff challenges, plaintiff is barred from recovery since those adverse employment actions would have been taken in any event.

K. Schacht may not recover for alleged "defamation" under the Due Process Clause of the Fourteenth Amendment to the United States Constitution or 42 U.S.C. § 1983.

L. Claims Schacht might have made under state law are barred either because of the exclusivity doctrines of ch. 102, Wis. Stats., or because Schacht failed to file timely notices of claims, or both.

WHEREFORE, the named defendants request that this court dismiss this action or, in the alternative, grant judgment to the named defendants and for such other relief as may be just.

[date and attorney subscription omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEITH D. SCHACHT,
Plaintiff,
v. Case No. 96 C 0122 S
WISCONSIN DEPARTMENT OF CORRECTIONS,
CATHERINE J. FARREY, CYNTHIA O'DONNELL,
RITA SMICK, THOMAS LALIBERTE,
RANDALL HEPP and ONE OR MORE JOHN DOES,
Defendants.

JOINT FINAL PRETRIAL REPORT

Plaintiff, Keith D. Schacht (Schacht) and defendants, Wisconsin Department of Corrections (DOC), Catherine J. Farrey (Farrey), Cynthia O'Donnell (O'Donnell), Rita Smick (Smick), Thomas Laliberte (Laliberte) and Randall Hepp (Hepp), submit this Joint Final Pre-Trial Report.

DATE OF PRE-TRIAL CONFERENCE
AND APPEARANCES FOR THE PARTIES

The final pre-trial conference is scheduled for September 4, 1996, at 1:15 p.m. Plaintiff will appear by Attorney David E. Lasker. Defendants will appear by Assistant Attorney General Richard Briles Moriarty.

STATEMENT OF UNDISPUTED FACTS

Plaintiff and defendants stipulate that the following facts are undisputed:[1]

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[1]The following abbreviations are used: Keith D. Schacht (Schacht); Wisconsin Department of Corrections (DOC); Catherine J. Farrey (Farrey); Cynthia O'Donnell (O'Donnell); Rita Smick (Smick); Thomas Laliberte (Laliberte); Randall Hepp (Hepp); Oakhill Correctional Institution, a facility operated by DOC (Oakhill); Captain Roy Boutin, an employe of Oakhill (Boutin); Sergeant Mattie, an employe of Oakhill (Mattie); William Hartwig, the Food Service Manager at Oakhill (Hartwig); Sergeant B. J. Mikkleson, an employe of Oakhill (Mikkleson); Sergeant Lois Bangs-Schacht, an employe of Oakhill (Bangs); Sergeant Dan Oaks, an employe of Oakhill (Oaks); Officer Arden Wilson, an employe of Oakhill (Wilson); the building designated as the Administration Building (the Administration building).

1. Schacht was employed as a correctional officer at Oakhill with DOC until discharged from his position on February 19, 1993.

2. He was employed as a correctional officer at various facilities operated by the State of Wisconsin from 1982 until his discharge.

3. DOC is an agency of the State of Wisconsin.

4. Between December 1, 1992, and February 18, 1993, the individual defendants held the following positions at Oakhill: Farrey was warden, O'Donnell was associate warden, Smick was personnel manager, Laliberte was a captain and Hepp was a lieutenant.

5. On February 8, 1992, Schacht stated in writing that "I ATTEST TO THE FACT THAT I HAVE CAREFULLY READ THE DEPARTMENT OF CORRECTIONS WORK RULES AND CODE OF ETHICS."

6. Among the Work Rules contained in a September 1991 Employe Handbook, Schacht stated he had carefully read the following:

> DEPARTMENT WORK RULES
>
> All employees of the Department are prohibited from committing any of the following acts:
>
> . . .
>
> 3. Stealing or unauthorized use . . . of state-owned or leased property, equipment, or supplies.
>
> . . .
>
> 7. Failure to provide accurate and complete information when required by management . . . .

7. Before December 1992, Schacht knew DOC Work Rules prohibited him both from stealing, or unauthorized use of, any state-owned or leased property, equipment, or supplies; and from failing to provide accurate and complete information when required by management.

8. By carefully reading an Employe Handbook, as he confirmed in writing on February 8, 1992, Schacht knew that violating any DOC Work Rule was considered

sufficient grounds for disciplinary action ranging from reprimand to immediate discharge.

9. Before December 1992, Schacht was trained by DOC that studies showed correctional officers had more impact than treatment staff on inmate attitudes toward change and rehabilitation, that correctional officers can serve as models to inmates as individuals who are successfully functioning in the outside world as law-abiding citizens and that correctional officers are powerful role models.

10. Before January 21, 1993, Laliberte and Farrey reviewed a written statement by Mikkleson, an employe of Oakhill, in which he stated, in part, that:

a. Schacht had juice belonging to Oakhill in Schacht's backpack in December 1992.

b. Schacht told Mikkleson that, whenever Schacht worked at a cottage at Oakhill and there was extra juice in the refrigerator at the cottage, Schacht took that extra juice home.

c. Mikkleson told Schacht, "don't tell me shit like that because I don't want to know about it," Schacht zipped up his backpack and left.

d. On January 12, 1993, at approximately 6:30 a.m., while Schacht was in Cottage 8 at Oakhill and after Mikkleson walked into Cottage 8, Schacht told Mikkleson he, Schacht, had so much stuff in his backpack he could not get his thermos in it and Schacht also told Mikkleson that his thermos had been in his backpack when he came to work.

11. That statement indicates Mikkleson had testified to its contents under oath.

12. On January 12, 1993, at approximately 6:30 a.m., Schacht had been in Cottage 8 at Oakhill when Mikkleson walked into Cottage 8.

13. For a staff member to engage in theft in a correctional institution, no matter how small the value of

the property involved, is serious and disruptive to the central mission of the correctional institution.

14. If, as was reported to be the case with Schacht, an inmate concludes a staff member has engaged in theft, the staff member can be subjected to blackmail in ways that could seriously jeopardize the security of the institution. For example, a staff member could be pressured by an inmate who knows of thefts by the staff member to ignore drugs or other contraband being smuggled into the institution. The staff member could also be pressured by an inmate who knows of thefts by the staff member to ignore that inmate causing physical harm to other inmates. The staff member could also be pressured to favor the inmate over other inmates in ways which could cause resentment and dangerous results.

15. It fundamentally destroys the goal of returning inmates to society as law-abiding citizens if the inmates are observing staff members, particularly correctional officers, engaging in theft. Instead of serving as role models for the inmates, staff members actually reinforce tendencies in inmates to act illegally.

16. If staff members steal food designated for inmates, the potential consequences are far more egregious. Unlike for persons in open society, who could merely purchase replacement food at a store if it were stolen from them, food available to inmates is restricted and is critically important to inmates. A basic axiom in correctional institutions is not to mess with an inmate's food. To do so could cause inmate protests, disturbances or other dangerous situations.

17. Farrey authorized a search of Schacht to be conducted on January 21, 1993, after he finished his shift and was walking toward the parking lot.

18. Farrey instructed O'Donnell (then Associate Warden) that if any property which appeared to be owned by Oakhill was found, Schacht was to be suspended without pay pending investigation.

19. Before January 21, 1993, Laliberte was instructed by O'Donnell to search Schacht the morning of January 21, 1993, after he walked outside the gate of Oakhill towards

the parking lot and, if any property which appeared to be owned by Oakhill was found, to suspend Schacht without pay pending investigation.

20. On the evening of January 20, 1993, and the morning of January 21, 1993, Schacht worked a shift to which he was assigned as a correctional officer.

21. On the morning of January 21, 1993, at the end of that shift, he was leaving Oakhill to walk to a parking lot outside of Oakhill and go home and was, at that time, wearing or carrying a backpack he owned.

22. After Schacht walked outside the gate of Oakhill towards the parking lot to go home, Laliberte asked Schacht to come into the Administration building.

23. Schacht entered the Administration building in response to that request and Laliberte contacted Boutin and Mattie, asking them to come to the Administration building.

24. On January 21, 1993, Schacht was a member of a union in connection with his employment at Oakhill.

25. After entering the Administration building, Schacht placed his backpack on a table in the lounge.

26. Bangs and other Oakhill employes were waiting in the parking lot for Schacht before driving to a place called Chub's to socialize.

27. Laliberte saw Bangs enter the Administration building, talk to Schacht and then leave the building. Laliberte believed Bangs lived at the same residence with Schacht and maintained a romantic relationship with him and that belief was correct.

28. Schacht told Bangs: "Go down to Chub's. When I find out what the hell is going on, I'll call you and I'll come down there."

29. Schacht asked Laliberte if he could take his backpack out to his truck. Schacht was referring to the truck in which he planned to go home at the end of his shift on January 21, 1993. Laliberte did not grant this request.

30. After Boutin and Mattie arrived, Laliberte asked Boutin, Mattie and Schacht to go to a hallway near the

Warden's office in the Administrative building stating that he wanted the four of them to be out of view of the public.

31. In the presence of Boutin and Mattie, Laliberte asked Schacht to empty his backpack.

32. Sergeant Mattie asked if he was acting as a union representative on Schacht's behalf and was told that he was.

33. In response to Laliberte's request, Schacht removed from his backpack, among other items, two (2) pounds of butter wrapped in two (2) plastic bags, six (6) pens and one (1) 3 ounce tube of Colgate toothpaste.

34. Boutin asked Schacht what was in the plastic bags and he stated it was two (2) pounds of butter.

35. In response to Laliberte or Boutin asking Schacht where he had obtained the two (2) pounds of butter, he stated he had received it from his daughter. Schacht also stated ~~he~~ had additional pounds of butter at his home that he had obtained from his daughter.

36. The two (2) plastic bags that were in Schacht's backpack on the morning of January 21, 1993, were property owned by Oakhill.

37. Schacht had taken those garbage bags owned by Oakhill, used them to wrap the butter before placing the butter in his backpack on January 21, 1993, and was leaving Oakhill to go home with those garbage bags in his backpack.

38. On January 21, 1993, Bill Hartwig was the Food Service Manager at Oakhill.

39. After speaking with Schacht in the hallway outside the Warden's Office about the two (2) pounds of butter, Laliberte asked Boutin, Mattie and Schacht to wait in that hallway stating he would be right back.

40. Laliberte knew the tube of toothpaste which was in Schacht's backpack was the same size, a 3 ounce tube, which was given to inmates of Oakhill for their use.

41. Laliberte and Hepp, as representatives of Oakhill management, required Schacht to provide accurate and complete information in both the investigatory interview held on February 4, 1993, and the second investigatory interview held on February 12, 1993.

42. Under DOC Work Rule 7, Schacht was required to provide accurate and complete information, in both the investigatory interview held on February 4, 1993, and the second investigatory interview held on February 12, 1993.

43. Schacht had told Laliberte and Hepp on February 4, 1993, that, when he received commodity butter from his daughter, that butter was frozen.

44. The two (2) pounds of butter removed from Schacht's backpack on the morning of January 21, 1993, were frozen when they were removed.

45. The reason the butter was frozen when removed from his backpack was because Schacht had removed the butter from one or more freezers at Oakhill during his shift.

46. Schacht told Laliberte and Hepp on February 4, 1993, that he had left the butter on a bathroom window sill from approximately 11:15 p.m., on January 20, 1993, until 1:00 to 1:30 a.m., on January 21, 1993, at which time he squeezed the butter and, finding it was "soft", put it in a freezer at Cottage 8 at Oakhill.

47. Schacht told Laliberte and Hepp on February 4, 1993, that he removed the butter from the freezer at about 6:00 a.m., and put it back on the window sill and also told them that at about 6:30 a.m., when he went to put it in his backpack it was "wet and sweaty" and "starting to thaw."

48. On February 4, 1993, Schacht also told Laliberte and Hepp, that he had, at 6:30 a.m., on January 21, 1993, removed the butter from a cottage freezer and then put both pounds of butter in "a small garbage bag."

49. Schacht actually put the two pounds of butter in two plastic bags during the morning of January 21, 1993.

50. Bangs told Laliberte and Hepp on February 4, 1993, that she had purchased that 3 ounce tube of Colgate toothpaste.

51. That 3 ounce tube of Colgate toothpaste was the same size and type of toothpaste Oakhill issued to its inmates for use by those inmates.

52. As of January 21, 1993, the Shopko store at Westside had not carried 3 ounce tubes of Colgate

toothpaste for more than two (2) years. Laliberte learned this through investigation.

53. On February 4, 1993, Schacht told Laliberte and Hepp that the garbage bags in which the butter was wrapped had been taken from a closet in Cottage 8; whereas on February 12, 1993, Schacht told Laliberte and Hepp that he had taken those garbage bags from an office wastebasket in Cottage 8.

54. A pre-disciplinary meeting was held with Schacht on February 17, 1993, with a union representative present on Schacht's behalf, at which Schacht was informed that, pursuant to an investigation that had been conducted, Schacht was found to be in violation of DOC Work Rules Nos. 3 and 7.

55. DOC had served a letter on Schacht, which he received at least 24 hours before that pre-disciplinary meeting, informing him of that meeting, the purpose of the meeting and that Schacht could have a union representative present at that meeting if he chose.

56. At the February 17, 1993, pre-disciplinary meeting, Schacht was told, with his union representative present, that the basis for the finding that he had violated Work Rule No. 3 was that he had removed state-owned property without authorization to do so; and that the basis for the finding that he had violated Work Rule No. 7 was that he had, during the investigation, provided incomplete, inaccurate and contradictory information.

57. At the pre-disciplinary meeting, he was also told, with his union representative present, that the potential discipline for the violations of the work rules which he was found to have committed could include termination of his employment.

58. In light of the time and expense DOC invests in training and providing experience to correctional officers with long tenure at DOC such as Schacht, it is important to the mission of DOC to assure discipline is imposed only when correctional officers actually engage in misconduct and when discipline is required.

59. Each of the defendants knew, when the suspension and discharge occurred, that discipline could not be

imposed on any correctional officer to further any personal vendetta against that correctional officer, to prevent that correctional officer from applying for a vacant position or to punish that correctional officer for any illegitimate purpose.

60. Each of the defendants knew that not providing a correctional officer a meaningful opportunity to be heard prior to discharge from employment was not lawful.

61. Schacht, under his union contract, had rights to file grievances challenging both the suspension without pay and the discharge.

62. Schacht took advantage of those rights by filing grievances challenging both the suspension without pay and the discharge.

63. Schacht was provided opportunities to challenge both the suspension without pay and the discharge through the third step of those grievance processes.

64. On June 3, 1994, the union representing Schacht dropped those grievances even though they could have been pursued to evidentiary hearing before an arbitrator.

STATEMENT OF MAJOR FACTUAL ISSUES

1. Was Schacht treated fairly and impartially regarding the decision to suspend him without pay on January 21, 1993?

2. Was Schacht treated fairly and impartially regarding the decision to discharge him from employment effective February 18, 1993?

3. Did Schacht receive the process to which he was due regarding the decision to suspend him without pay on January 21, 1993?

4. Did Schacht receive the process to which he was due regarding the decision to discharge him from employment effective February 18, 1993?

[The balance of the Joint Final Pretrial Report, disclosing witnesses, exhibits, and other matters unrelated to the facts are omitted.]

[date and plaintiff's and defendants' attorney subscriptions omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEITH D. SCHAC[H]T,
Plaintiff,

v.

MEMORANDUM AND ORDER

WISCONSIN DEPARTMENT OF CORRECTIONS, CATHERINE J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE and RANDALL HEPP,
Defendants.

96-C-122-S

Plaintiff Keith D. Schac[h]t commenced this civil action pursuant to 42 U.S.C. §1983 in Dane County Circuit Court. Defendants Wisconsin Department of Corrections, Catherine J. Farrey, Cynthia O'Donnell, Rita Smick, Thomas Laliberte and Randall Hepp removed the action to this Court. Plaintiff alleges that he was suspended without pay and subsequently terminated from his employment by the defendants without due process of law.

On July 15, 1996 defendants filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response

must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Keith D. Schact [sic] was employed as a correctional officer at Oakhill Correctional Institution, Oregon, Wisconsin (OCI). Defendant Wisconsin Department of Corrections is an agency of the State of Wisconsin. At all times material to this action, defendant Catherine J. Farrey was the warden, and defendant Cynthia O'Donnell was the associate warden at OCI. Defendant Rita Smick was the personnel officer. Defendants Thomas Laliberte and Randall Hepp were correctional officers.

On February 8, 1992 plaintiff attested in writing that he had carefully read the Department of Corrections Work Rules and Code of Ethics. The Work Rules provided in pertinent part as follows:

> All employees of the Department are prohibited from committing any of the following acts:
>
> ....
>
> 3. Stealing or unauthorized use... of state-owned or leased property, equipment or supplies.
>
> 7. Failure to provide accurate and complete information when required by management....

Plaintiff knew that a violation of these Work Rules was considered sufficient grounds for disciplinary action ranging from reprimand to immediate discharge.

Prior to January 21, 1993 defendant Farrey suspected, based on a written statement by Sergeant B. J. Mikkleson and reports by inmates, that plaintiff was stealing food.

On this information she authorized a search of plaintiff to be conducted as he was walking toward the parking lot after his shift.

Defendant Laliberte asked plaintiff as he was leaving Oakhill on January 21, 1993 to return to the Administration Building. Plaintiff's union representative was also present. Defendant Laliberte searched plaintiff's backpack. He found two pounds of butter wrapped in two plastic garbage bags, six pens and one 3 ounce tube of toothpaste. The two plastic bags were Oakhill property. Defendant Laliberte spoke to Bill Hartwig, the Food Service Manager, concerning the butter and its labeling used by Oakhill. It matched the butter in plaintiff's backpack. Defendant Laliberte suspended plaintiff without pay pending an investigation.

Defendants Laliberte and Randall Hepp held investigatory interviews with plaintiff on February 4, 1993 and February 12, 1993. It is disputed whether or not plaintiff provided accurate and complete information during these meetings. It is also disputed whether defendants conspired to terminate his employment, trumped up false charges against him and acted in bad faith.

A pre-disciplinary meeting was held with plaintiff on February 17, 1993 with a union representative present on plaintiff's behalf. Plaintiff had received notice of the meeting at least 24 hours prior to the meeting informing him of its purpose. At the meeting Plaintiff was told that there was a factual basis for finding he had violated Work Rule 3, removing state owned property without authorization and Work Rule 7, failing to provide complete and accurate information. He was advised that the potential discipline for such violations was termination. Plaintiff was asked whether he had any statement he would like to [sic] and he replied, "No".

On February 18, 1993 a meeting was held with plaintiff and his union representative at which a letter dated February 18, 1993 from Farrey terminating his employment was read. Plaintiff was again asked if he wished to make a statement and he declined.

Plaintiff applied for unemployment compensation benefits after he was suspended without pay on January 21, 1993 and filed an additional application after he was discharged from employment effective February 18, 1993. Under plaintiff's union contract he had rights to file grievances challenging both the suspension without pay and the discharge. He pursued his grievances through the third step of the discharge. He pursued his grievances through the third step of the process. On June 3, 1993 the union decided not to pursue plaintiff's grievance to arbitration.

MEMORANDUM

Plaintiff claims that he was deprived of property and liberty interests in violation of the Fourteenth Amendment due process clause pursuant to 42 U.S.C. § 1983. Defendants contend that plaintiff's claims against the Wisconsin Department of Corrections and the individual defendants in their official capacities are barred by the Eleventh Amendment. Plaintiff agrees his claims for money damages are barred but pursues his claims for injunctive relief. Plaintiff does not, however, request injunctive relief in his complaint and such relief is not appropriate where plaintiff is seeking monetary relief rather than reinstatement. Defendants' motion to dismiss plaintiff's claims against the Wisconsin Department of Corrections and the individual defendants in their official capacities will be granted.

Plaintiff seeks to add Sergeant B. J. Mikkleson as a defendant in this action. This motion will be denied as untimely under Rule 20, Federal Rules of Civil Procedure. There are no allegations that Mikkleson participated in the decisions to suspend or terminate plaintiff or that he denied him due process protections. Nor is there any reason to delay trial at this late date in the event further proceedings should become necessary as a result of the addition requested. Final pre-trial conference and discovery have been held and completed respectively.

Plaintiff claims that he was deprived of his continued employment without procedural due process protections when he was suspended without pay on January 21, 1993

and terminated on February 18, 1993. For purposes of deciding defendants' motion for summary judgment it is assumed that plaintiff had both protected property and liberty interests in his continued employment. Defendants move for summary judgment based on the ground that plaintiff received the due process protections to which he was entitled. Any disputes of fact remaining concerning plaintiff's conduct or the investigation itself are not material or relevant to resolve defendants' motion.

In his complaint and brief in opposition to defendants' motion for summary judgment plaintiff pursues a procedural due process claim and further contends that defendants conspired to terminate his employment, trumped up false charges against him and acted in bad faith. He claims he was not treated fairly and impartially. Although not pursued by either party plaintiff may be arguing that this unfairness violated his substantive due process rights.

The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. Zinermon v. Burch, 494 U.S. 113, 125 (1190). To state a substantive due process claim, in addition to alleging that the decision was arbitrary and irrational, plaintiff must show either a separate constitutional violation or the inadequacy of state law remedies. New Burnham Prairie Homes v. Village of Burnham, 910 F. 2d 1474, 1481 (7th Cir. 1990). Plaintiff has neither alleged nor shown a separate constitutional violation. Further, he has not alleged or shown the inadequacy of state law remedies. Finally, plaintiff has neither stated a substantive due process claim nor cited any authority for it.

Accordingly, the Court addresses plaintiff's only claim, that of procedural due process. Plaintiff was suspended without pay on January 21, 1993. He did not receive an opportunity to be heard prior to his suspension. The Seventh Circuit Court of Appeals addressed the question of whether a pre-suspension hearing is a required procedural due process protection in Jones v. City of Gary,

Indiana, 57 F. 3d 1435 (7th Cir. 1995). The Court applied the three factors provided in Matthews v. Eldridge, 424 U.S. 319, 335 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Applying these factors to the case of Jones, a firefighter, who was suspended without pay for failing to return to work from sick leave, the Court held as follows:

> Thus, there was no risk that Jones was erroneously deprived of his protected interest in employment without a pre-suspension hearing and thus we hold that Jones was not denied due process by the failure of the fire department to provide him with a pre-suspension hearing.

Jones, 57 F.3d at 1443.

In Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F. 3d 623 (7th Cir. 1995), the Court held that a bus driver who was suspended without pay after an accident was not entitled to a pre-suspension hearing under the due process clause. The Court stated at p. 628:

> Applying *Matthews* and these subsequent cases to the facts at hand, we have little trouble concluding that due process did not mandate giving Chaney additional notice or a hearing before Pace suspended him. Chaney's interest in avoiding a suspension is significant. Nevertheless, Chaney was on notice to why he was being suspended and Pace's interest in both managerial efficiency and in public safety clearly outweigh Chaney's interest in a pre-suspension hearing. The Constitution does not mandate additional protections at this stage.

Here plaintiff was a correctional officer accused of stealing. He was suspended without pay on January 21,

1993 without an opportunity to be heard. Plaintiff was advised of the reason for his suspension. Using the Matthews factors, the government's interest in the efficient and safe operation of the correctional institution outweighs the plaintiff's interest in a pre-suspension hearing. An investigation was conducted after the suspension and plaintiff was given an opportunity to be heard in two interviews and at a pre-disciplinary hearing. These procedures lessened the risk of an erroneous deprivation of plaintiff's protected interests. Due process does not require that plaintiff be provided a pre-suspension hearing.

Plaintiff also claims that he was denied due process protections when he was terminated on February 18, 1993. In Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542-43 (1985), the United States Supreme Court held that a person who has a property interest in employment may not be discharged without a prior opportunity to hear the employer's evidence and respond to the claims against him. The pre-termination opportunity to be heard need not be elaborate if there is timely post-termination process. Id. The Court held in Chaney that due process required a pre-termination notice and an opportunity to respond where a bus driver was terminated after an accident even where post-termination procedures exist. The Court further found that the grievance and arbitration procedures satisfied the requirements of post-deprivation due process.

It is undisputed that plaintiff was provided notice that he may be terminated for alleged violation of work rules. He was provided an opportunity to be heard at two investigatory interviews. At a pre-disciplinary hearing on February 17, 1993 he was given an opportunity to be heard on the charges. When the letter of termination was read to him at a meeting the following day he was also given an opportunity to make a statement. Plaintiff was given notice and an opportunity to be heard prior to his February 18, 1993 termination. This satisfied the pre-termination due process requirement.

Subsequent to his termination plaintiff pursued the grievance procedures available to him. These procedures

satisfied the requirements of post-deprivation procedural due process.

Plaintiff received the procedural due process protections to which he was entitled concerning both his suspension and his termination. Accordingly, defendants' motion for summary judgment will be granted.

ORDER

IT IS ORDERED that plaintiff's motion to add Sergeant B.J. Mikkleson as a defendant is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants against the plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 13th day of September, 1996.

BY THE COURT:

/s/ John C. Shabaz

JOHN C. SHABAZ
District Judge

In the

United States Court of Appeals

for the Seventh Circuit

No. 96-3633

Keith D. SCHACHT, Plaintiff-Appellant,
v.
WISCONSIN DEPARTMENT OF CORRECTIONS,
et al., Defendants-Appellees.

Appeal from the United States District
for the Western District of Wisconsin.
No. 96-C-122-S--**John C. Shabaz**, Chief Judge.

Argued April 21, 1997 - Decided June 17, 1997.

Before BAUER, CUDAHY and DIANE P. WOOD, *Circuit Judges*.

DIANE P. WOOD, *Circuit Judge*. The dispute in this case began when plaintiff Keith Schacht was discharged from his position as a correctional officer at the Oakhill Correctional Institution, located in Oregon, Wisconsin. Believing that the Wisconsin Department of Corrections (WDOC) and several officials at the correctional facility (acting in both their individual and official capacities) denied him his right to both substantive and procedural due process in the pre- and post-termination proceedings, Schacht filed suit in Dane County Circuit Court, alleging various violations of 42 U.S.C. § 1983. The defendants, relying on 28 U.S.C. § 1441(a), then removed the case to federal court, where the district court below dismissed the claims against the state defendants that were barred by sovereign immunity and granted summary judgment to the defendants on all remaining claims. Unfortunately, all of these efforts were for naught. Because the district court

lacked subject matter jurisdiction over this case, we must vacate its judgment and instruct the district court to send all claims back to square one--Dane County Circuit Court.

I

On the morning of January 21, 1993, Keith Schacht had just completed his overnight shift at Oakhill and was headed for the exit door when he was stopped by defendant Captain Thomas Laliberte, who pulled Schacht aside and asked Schacht to empty his backpack. Schacht complied, and the ensuing search established that his backpack contained (among other things) two garbage bags, six pens, two pounds of government commodity butter, and a three-ounce tube of toothpaste. To the defendants, each of these items appeared similar to items used in the facility. Their presence in the backpack therefore confirmed the defendants' suspicions that Schacht had been stealing items from the prison. Schacht, however, maintained that the pens, butter, and toothpaste all belonged to him, and that it was a common practice, in which the prison management acquiesced, for Oakhill employees occasionally to take garbage bags for their personal use.

The upshot of all this for Schacht was a suspension without pay pending an investigation. The prison officials conducted a series of interviews and hearings, but Schacht believed the deck was stacked against him, as the hearings were conducted by Laliberte and Randall Hepp, both of whom Schacht believed were biased against him for being too much of a "by the book" officer. Ultimately, Schacht was formally discharged on February 18, 1993, and after aborted efforts at various grievance proceedings, Schacht filed suit in Wisconsin state court. In his complaint, which named the WDOC and a host of employees at Oakhill as defendants, Schacht asserted that he had been wrongfully discharged and deprived of his constitutionally protected liberty and property interests in continued employment, all in violation of the due process clause of the federal Constitution. The complaint asked for compensatory and punitive damages against all defendants, as well as costs, fees and any other relief the court deemed appropriate.

II

At this point, all was well. Unbeknownst to both sides, however, the roof fell in when the defendants removed (without objection from Schacht) the case to federal court and the district court proceeded to resolve the case on the merits. The Achilles' heel of the case was the group of claims for monetary damages against the WDOC and the state officials in their official capacities, which were barred by sovereign immunity. The presence of these claims meant that the district court did not have original jurisdiction over the entire action, and thus that the defendants' removal under 28 U.S.C. § 1441 was improper.

We explained why this is so in *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.1994), in which state defendants similarly tried to remove an action containing claims barred by state sovereign immunity as reflected in both the Eleventh Amendment and *Hans v. Louisiana*, 134 U.S. 1, (1890). We concluded that the district court lacked jurisdiction over the case because sovereign immunity acted as a limit on the original subject matter jurisdiction of the courts with respect to the barred claims (rather than as a form of common law immunity). *Frances J.*, 19 F.3d at 340, citing *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1400 (7th Cir.1993). The lack of jurisdiction over some claims in the case precluded removal of the action as a whole, because § 1441(a) confers removal jurisdiction only where the district court has the authority to adjudicate all of the claims in the case. *Frances J.*, 19 F.3d at 341. In so holding, we rejected the notion that the district court could cure this problem by simply dismissing or remanding the barred claims. Section 1441(c) contemplates certain cases in which separate and independent removable claims are joined with others that are not removable, but it gives the district court the choice of retaining the full case and "determining all issues" therein, or remanding all matters in which state law predominates. As we pointed out in *Frances J.*, this implies that the district court must have the *power* to determine all the issues in the case, either through original or supplemental jurisdiction. Claims barred by sovereign immunity stand on different footing than other claims that

are not independently removable, because of the affirmative limitation on jurisdiction imposed by the sovereign immunity doctrines. See *Frances J.*, 19 F.3d at 340 n. 4. Under § 1441, "if even one claim in an action is jurisdictionally barred from federal court by a state's sovereign immunity, or does not otherwise fit within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal courts, then, as a consequence of § 1441(a), the whole action cannot be removed to federal court." *Frances J.*, 19 F.3d at 341. See also *International College of Surgeons v. City of Chicago*, 91 F.3d 981, 987 (7th Cir.1996) ("removal is proper only if the action originally could have been brought in the district court"), *cert. granted*, 117 S.Ct. 1424, (1997); *Gorka by Gorka v. Sullivan*, 82 F.3d 772, 774-75 (7th Cir.1996) (following *Frances J.*); 28 U.S.C. § 1441(a) (discussing removability of *actions*, rather than claims).

In Schacht's case, it is evident that at the time of removal, the complaint included several claims that were barred by sovereign immunity. Schacht wanted monetary relief from the WDOC and from five Oakhill employees, whom he was suing in both their official and individual capacities. Since the State of Wisconsin would be the real party in interest with respect to the official capacity and WDOC claims, the district court could not adjudicate those claims without an authoritative waiver of the state's sovereign immunity. See *Frances J.*, 19 F.3d at 342, citing *Dugan v. Rank*, 372 U.S. 609, 620, (1963) (noting that a lawsuit is against a sovereign if the judgment from successful claims would inevitably be paid from the public treasury). See also *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305-06, (1990) (A state's waiver of sovereign immunity must be explicit and unambiguous). The defendants here and the district court below were undoubtedly aware of this problem, as it took no time for the district court to grant the defendants' motion to dismiss the claims against the WDOC and the Oakhill employees in their official capacities. As we noted above, however, the dismissal of the barred claims on the merits did not cure the initial defect in removal.

At oral argument, we raised the issue of jurisdiction and the propriety of removal *sua sponte*, and requested supplemental briefing from both sides on the relevance of *Frances J.* to this case. See *Edelman v. Jordan*, 415 U.S. 651, 677-78, (1974) (subject matter jurisdiction can be addressed at any stage of a given legal proceeding). Schacht opted to concede the jurisdictional flaw, but the defendants contend that we may reach the merits of this case notwithstanding *Frances J.* because remand would be futile and would result in a waste of judicial resources. Specifically, the defendants contend that if we remand, the state court will simply dismiss the official capacity claims and the claims against the WDOC for failing to state a claim on which relief may be granted, or on grounds of sovereign immunity, and duplicate the analysis the district court devoted to the remaining claims. See *Lindas v. Cady*, 441 N.W.2d 705, 709 (Wis.1989) (noting that "states are not 'persons' within the meaning of § 1983"). See also *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1069, (1997) (noting that "sec.1983 actions do not lie against a State").

Even if the defendants have accurately forecast the fate of this case on remand, we are not free to disregard a jurisdictional defect. See *Arizonans*, 117 S.Ct. at 1071. Contrary to their suggestion, there is no "futility" exception to § 1447(c). The Supreme Court noted that the literal words of § 1447(c) leave no room for such an exception. See *Primate Protection League v. Tulane Educational Fund*, 500 U.S. 72, 89, (1991). See also 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded.") (Emphasis added). Furthermore, in *Smith v. Wisconsin Dept. of Agriculture*, we rejected an identical "futility" argument, instead holding that remand was required even if the state court would only respond by dismissing the remanded claims. 23 F.3d 1134, 1139 (7th Cir.1994). Although in some previous cases involving the removal of claims barred by sovereign immunity (of which *Smith* was one), we have remanded only the barred claims, while deciding the remaining claims on the merits, the

jurisdictional issue was not called to the court's attention. See, for example, *Smith*, 23 F.3d at 1142-43. See also *Weinberger v. Wisconsin*, 906 F.Supp. 485, 491 (W.D.Wis.1995), *judgment aff'd*, 105 F.3d 1182 (7th Cir.1997). They do not, therefore, support the proposition that the *Frances J.* rule is limited in its application. Last, while the principles of judicial economy are not to be taken lightly, these principles cannot override constitutional or statutory limits on subject matter jurisdiction. We regret that the improper removal in this case will lead to yet additional litigation, but we remind both sides that much time and effort could have been saved had further consideration been given to the propriety of removal at the outset.

We therefore VACATE the judgment of the district court, and REMAND this case with instructions for the district court to remand the entire action to state court. Although Schacht requested costs and attorneys' fees in his supplemental brief, we agree with the state that his request was improperly presented and without merit in any event. Each side is to bear its own attorneys' fees and costs on appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEITH D. SCHACHT,
Plaintiff,

v.

ORDER

WISCONSIN DEPARTMENT OF CORRECTIONS, CATHERINE J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE, and RANDALL HEPP,
Defendants.

96-C-122-S

Pursuant to judgment previously entered in the above entitled matter by the United States Court of Appeals for the Seventh Circuit on June 17, 1997,

ORDER

IT IS ORDERED that the above entitled action is REMANDED in its entirety to the Circuit Court for Dane County, Wisconsin.

Entered this 15th day of July, 1997.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

STATE OF WISCONSIN
DANE COUNTY CIRCUIT COURT BRANCH 13

KEITH D. SCHACHT,
Plaintiff,
v. Case No. 95 CV 3087
WISCONSIN DEPARTMENT OF CORRECTIONS,
KATHRYN J. FARREY, CYNTHIA O'DONNELL,
RITA SMICK, THOMAS LALIBERTE,
RANDALL HEPP and ONE OR MORE JOHN DOES,
Defendants.

ORDER GRANTING MOTION TO STAY
PROCEEDINGS PENDING RESOLUTION
OF PETITION FOR WRIT OF CERTIORARI

This court having before it defendants' Motion to Stay Proceedings Pending Resolution of Petition for Writ of Certiorari, and being advised in the premises, and finding that Motion proper and one which should be granted, IT IS HEREBY ORDERED that this proceeding is stayed pending resolution of the Petition for Writ of Certiorari which defendants represent they will be filing by September 15, 1997, that defendants are to provide this court with a copy of that Petition after it has been filed, and that defendants' counsel is to inform this court, and opposing counsel, of the resolution of that Petition within twenty (20) days after that resolution by the United States Supreme Court.

Dated this 29th day of August, 1997.

BY THE COURT:
/s/ Michael Nowakowski
Michael Nowakowski
Circuit Court Judge

Supreme Court, U.S.
FILED
FEB 26 1998
CLERK

No. 97-461

In The

Supreme Court of the United States

October Term, 1997

WISCONSIN DEPARTMENT OF CORRECTIONS,
et al.

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS ON THE MERITS

JAMES E. DOYLE
Attorney General
RICHARD BRILES MORIARTY*
Assistant Attorney General
Wisconsin Department of Justice
123 West Washington Avenue
Madison, Wisconsin 53707
Telephone: (608) 267-2796
Counsel for Petitioners

*Counsel of Record

50pp

QUESTION PRESENTED

Where a plaintiff never objects to removing a civil action asserting only federal claims under 42 U.S.C. § 1983, must an appellate court, on its own motion, vacate judgment for defendants, and remand the entire action to State court, simply because the plaintiff included claims which any court would have dismissed?

LIST OF PARTIES

Respondent, KEITH D. SCHACHT (referred to as "Schacht"), sued petitioner, WISCONSIN DEPARTMENT OF CORRECTIONS (referred to as "the Department"). He also sued the remaining petitioners, CATHERINE J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE, RANDALL HEPP, and ONE OR MORE JOHN DOES, (referred to as "the remaining defendants") in their individual and official capacities as employes of the Department's Oakhill Correctional Institution. Schacht did not amend his pleadings to identify any unnamed defendant. The district court denied his attempt, through a brief filed shortly before the trial date, to add another Oakhill employe, B.J. MIKKLESON, as a defendant.

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No. 97-461

In The

Supreme Court of the United States

October Term, 1997

WISCONSIN DEPARTMENT OF CORRECTIONS,
et al.,

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER ON THE MERITS

By creating, without any valid legal support, a vast exception to the removal statutes, the Seventh Circuit decision cast aside a reasoned district court judgment on the merits, vital constitutional and statutory guarantees and effective judicial administration. The decision below, in this removed action asserting only federal claims under 42 U.S.C. § 1983, vacated judgment for defendants, and remanded the entire case to State court, solely because Schacht, who never objected to removal, made Section 1983 claims against the State that were subject to a sovereign immunity defense.

Whenever a plaintiff makes a Section 1983 claim in a State court action, the defendants have a right to remove to federal court. 28 U.S.C. §§ 1331, 1343(a)(3) and 1441. Because the State could assert an Eleventh Amendment immunity defense to claims made against it, the decision below punished the State, and State officials sued personally, by making their joint right of removal contingent on the State surrendering its constitutional entitlement to Eleventh Amendment immunity.

The decision below was flawed on many levels. The district court had removal jurisdiction simply because, had Schacht filed in district court, it would have had original jurisdiction of the individual capacity claims. City of Chicago v. International College of Surgeons, 118 S.Ct. 523 (1997). Since a State is not a "person" under Section 1983, it was both unnecessary and improper to consider Eleventh Amendment immunity in analyzing the propriety of removal. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989). Regardless, a potential Eleventh Amendment immunity defense, unlike certain jurisdictional bars, only affects federal court jurisdiction when, and to the extent, it is raised and pressed by the State. Since the defense is for States, not federal courts, to use and control (Patsy v. Board of Regents, 457 U.S. 496 (1982)), it can never deprive either States, or other defendants sued with States, of their removal rights.

While acknowledging that the Section 1983 claims against a State are so defective that Wisconsin courts will unquestionably dismiss them, the Seventh Circuit decision deemed those claims poisonous to removal jurisdiction and voided the extensive district court proceedings and sent the parties back to the State circuit court to start over. The decision below allows plaintiffs making purely federal claims to deprive States, State officials sued personally -- and even defendants unconnected with any State unfortunate enough to be joined as defendants -- of minimal removal rights granted by Congress.

All a plaintiff need do to avoid a federal court forum and frustrate Congressional intent, though making purely federal claims, is include a baseless claim against which an Eleventh Amendment immunity defense could be interposed. This turns both States, and any defendants joined with States, into second-class litigants and transforms the shield of Eleventh Amendment immunity into a sword which plaintiffs can unilaterally use against them. The decision below twists federal constitutional and statutory guarantees beyond recognition, encourages abusive pleading practices and should be reversed.

OPINIONS BELOW

The decision below is reported (Schacht v. Wisconsin Department of Corrections, 116 F.3d 1151 (7th Cir. 1997)) and reprinted at J.A. 35-40. The district court opinion is unreported and reprinted at J.A. 27-34.

JURISDICTION

This action asserting federal claims was timely removed from State court. (J.A. 1, 6, 8-9.) The district court had jurisdiction. 28 U.S.C. §§ 1331, 1343(a)(3) and 1441. Schacht appealed from a district court judgment against him. (J.A. 27-34.) The appellate court had jurisdiction. 28 U.S.C. § 1291. The appellate court decision issued on June 17, 1997 (J.A. 35) and the petition, filed on September 12, 1997, was granted on January 16, 1998. The appellate court vacated the judgment and directed a remand to the State court. (J.A. 40.) This Court has jurisdiction. 28 U.S.C. § 1254(1). *See* Grubbs v. General Electric Credit Corp., 405 U.S. 699, 700 (1972).

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED

U.S. Const. amend. XI provides:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XIV provides, in pertinent part:

> Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .
>
> . . .
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Wis. Const. art. IV, § 27 provides:

> **Suits against state.** SECTION 27. The legislature shall direct by law in what manner and in what courts suits may be brought against the state.

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343(a)(3) provides:

> **(a)** The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> **(3)** To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

28 U.S.C. § 1441 provides, in pertinent part:

> **(a)** Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending . . . .
>
> **(b)** Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties . . . .

28 U.S.C. § 1447(c) provides, in pertinent part:

> **(c)** . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Rule 12(b) of the Federal Rules of Civil Procedure, provides, in pertinent part:

> **(b)** . . .[T]he following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

Rule 802.06(2)(a), Wis. Stats., provides, in pertinent part:

> **(2)** . . . (a) . . . [T]he following defenses may at the option of the pleader be made by motion:
>
> . . .
>
> 6. Failure to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

Schacht sought monetary relief in Wisconsin circuit court, under 42 U.S.C. § 1983 (Section 1983), asserting that the Department and the remaining defendants breached the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, by suspending his State employment without pay in January 1993 and discharging him for work rule violations in February 1993. (J.A. 1, 6, 27, 30, 35.) The Department and the remaining defendants removed the action to federal court. (J.A. 8-16.)

The parties agreed that the central facts were undisputed and that only due process issues were presented for resolution. (J.A. 17-26.) Citing immunity secured by the Eleventh Amendment to the United States Constitution, U.S. Const. amend. XI, the district court dismissed claims against the Department and official capacity claims against the remaining defendants. (J.A. 28.) It denied a request to name a new defendant, found no substantive due process claims were pled, and granted summary judgment to the remaining defendants on the individual capacity claims. (J.A. 27-32.) On appeal, Schacht did not challenge the dismissal of the claims against the Department or of the official capacity claims.

Schacht never questioned the propriety of removal until the Seventh Circuit, during oral argument following briefing on the merits, raised the issue on its own initiative and called for supplemental briefs. (J.A. 37, 39.) The Seventh Circuit held that the potential, at time of removal, that Eleventh Amendment immunity might bar some claims had deprived the district court of removal jurisdiction. (J.A. 35-40.) The decision below concluded that the potential, at time of removal, that the State could chose to bar some claims through Eleventh Amendment immunity meant the district court could not fully adjudicate every claim Schacht made. (J.A. 37-40.) The

Seventh Circuit characterized that potential as an "Achilles' heel" which rendered removal jurisdiction over this action void from the outset. (J.A. 37-40.) It vacated the judgment against Schacht and required remand to the State court. (J.A. 35-40.) The district court complied. (J.A. 41.) The State court stayed the action pending disposition of defendants' request for review by this Court. (J.A. 42.)

SUMMARY OF THE ARGUMENT

The decision below turned on reasoning contrary to principles this Court has carefully developed and articulated. Erroneously assuming that, because Schacht pled Section 1983 claims subject to State sovereign immunity, the district court lacked removal jurisdiction, the decision below actually used the State's immunity from suit to subject the State and the remaining defendants, sued both officially and personally, to relitigation of this entire case. The decision below is flawed no matter how deeply it is probed.

1. Had this action commenced in the district court, it would have had original jurisdiction over the individual capacity claims. That, by itself, sufficed to invoke removal jurisdiction.

2. Section 1983 claims against States are always fatally defective for the nonjurisdictional reason that a State is not a "person" under that statute. It was, therefore, unnecessary and improper to question the effect of Eleventh Amendment immunity on the removal of Section 1983 claims against a State.

3. Eleventh Amendment immunity is a defense for States, not federal courts, to raise. It cannot bar States, much less defendants involuntarily joined with States, from exercising their right of removal.

4. Without any valid legal support, the decision below required a State court remand, and relitigation of this action, because Schacht pled claims which, the Seventh Circuit acknowledged, would also unquestionably be dismissed by the State court.

This is no way to run a judicial system. State governments, sharing sovereignty with the federal government, deserve special constitutional consideration whenever they are involuntarily sued for alleged violations of federal law. The decision below instead allows plaintiffs, by including federal claims so defective they would be dismissed by any court, to unilaterally deprive States, and defendants unfortunate enough to be joined with States, of minimal removal rights which Congress intended to grant all defendants. All a plaintiff need do to avoid having federal courts resolve federal law claims, under the Seventh Circuit reasoning, is assert one base'ess claim which Eleventh Amendment immunity could bar.

Eleventh Amendment immunity should never be transformed from a shield appropriate to a fellow sovereign in a federal system into a sword which either federal courts or plaintiffs may use to reduce States, and those defendants joined with States, to second-class litigants.

ARGUMENT

In a removed action asserting only federal claims under 42 U.S.C. § 1983, an appellate court should not, based on the plaintiff having included claims against a State, vacate judgment for defendants, and remand the entire action to State court.

I. Removal jurisdiction exists if the district court has federal question jurisdiction over just one claim.

When a plaintiff, as here, never objects to removal and the district court proceeds to judgment, "the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." Grubbs, 405 U.S. at 702. Removal jurisdiction grounded on the existence of federal questions is determined as of the time of removal. *E.g.*, NPSA Service Corp. v. Independent American Savings, 868 F.2d 1415, 1417 (5th Cir. 1989). *See also* Saint Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 292-93 (1938).

Had Schacht filed this action in federal district court, it would have had jurisdiction over the individual capacity claims on which the appeal focused. *E.g.*, Moor v. County of Alameda, 411 U.S. 693, 712 (1973) *citing* Monroe v. Pape, 365 U.S. 167 (1961). When this action was removed, those individual capacity claims sufficed to invoke removal jurisdiction since they required resolution of substantial questions of federal law. *E.g.*, City of Chicago, 118 S.Ct. at 530. The Department and the remaining defendants had to join together to remove since

only a single controversy was alleged. *E.g.*, Chicago, R.I. & P. Ry. Co. v. Martin, 178 U.S. 245, 247-48 (1900).

The Seventh Circuit decision dramatically deviated from the Grubbs standard. It instead relied on a line of its own holdings in other decisions, rejected in City of Chicago last December, which characterized removal jurisdiction as dependent on district courts having power over each claim pled in removed actions. (J.A. 37-38 citing Frances J. v. Wright, 19 F.3d 337 (7th Cir. 1994), *reh. and reh. en banc denied*, *cert. denied*, 513 U.S. 876 (1994); Gorka by Gorka v. Sullivan, 82 F.3d 772, 773 (7th Cir. 1996), *reh. and reh. en banc denied*; Intern. College of Surgeons v. City of Chicago, 91 F.3d 981 (7th Cir. 1996), *rev'd and remanded*, City of Chicago v. International College of Surgeons, 118 S.Ct. 523 (1997).)

The decision below declared that a district court has jurisdiction in a removed action "only where the district court has the authority to adjudicate all of the claims" and that, to make removal proper, the district court "must" have had the power to "determine all the issues in the case." (J.A. 37.) While the district court may well have had the power to adjudicate all of the claims made by Schacht, that is irrelevant. Original jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and 1441 instead refers to the district court's threshold ability to consider a civil action, not whether some claims may be jurisdictionally flawed from the outset or fall by the wayside before full adjudication on the merits. Grubbs, 405 U.S. at 702; City of Chicago, 118 S.Ct. at 530.

Removal was more clearly proper here than in City of Chicago. The plaintiffs in City of Chicago asserted both federal and state law claims and refrained from relying on Section 1983 in commencing their state court action. City of Chicago v. International College of Surgeons, 118 S.Ct. 534, 537 and 540 (1997) (Ginsburg and Stevens, JJ., dissenting). By contrast, Schacht pled only claims under

the United States Constitution and sought relief only under Section 1983. (J.A. 1, 6, 27, 30, 35.) The district court had jurisdiction over all of Schacht's claims since they alleged violations of the United States Constitution and were brought under Section 1983. 28 U.S.C. §§ 1331, 1343(a)(3) and 1441.

The State court would plainly have dismissed all but the individual capacity claims, based on Will or sovereign immunity or both. (Pp. 27-28 *infra*.) It was particularly egregious for the Seventh Circuit to reach out and require the remaining defendants, after they definitively showed that the claims Schacht pursued against them on a personal basis were factually unsupported (J.A. 17-26, 28-32), to start all over again in State court. These State officials will again be distracted from their public duties to defend themselves against Schacht's baseless claims.

The Seventh Circuit error did not arise from subtle anomalies in how Schacht pled his claims. It arose from the Seventh Circuit having completely misconstrued, in a series of decisions starting with Frances J., numerous constitutional and statutory principles. A few hypotheticals recasting how Schacht might have pled this action demonstrate the magnitude of the error in the decision below.

Removal jurisdiction would have been invoked if the district court only had federal question jurisdiction over one of several removed claims. If this action had commenced in district court, and Schacht made only one Section 1983 individual capacity claim and some State law claims, original jurisdiction would plainly have existed over the individual capacity claim. *E.g.*, Moor, 411 U.S. at 712. Just one claim presenting a substantial federal question suffices to create removal jurisdiction. City of Chicago, 118 S.Ct. at 530 (state law claims could not make removal improper since the "federal claims suffice to make the

actions 'civil actions' within the 'original jurisdiction' of the district courts for purposes of removal. § 1441(a).") Where a plaintiff "asserts a substantial claim" under a federal statute, "that assertion alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the [statute] does provide the claimed rights" and the district court then has "'power to determine whether it was or was not well founded in law and in fact.'" Romero v. International Term. Operat. Co., 358 U.S. 354, 359 (1959), *reh. denied*, 359 U.S. 962.

Had Schacht pled Section 1983 claims only against the State, included no individual capacity claims and made State law claims, that would not have defeated removal. In that scenario, the district court could have abstained, either by dismissing the federal claims, because a State is not a "person" under Section 1983 (pp. 15-19 *infra*), and remanding the remaining State law claims or by remanding the entire case. *E.g.*, Huffman v. Pursue, Ltd., 420 U.S. 592, 603-08 (1975). The Section 1983 claims, however, though flawed for nonjurisdictional reasons (pp. 15-19 *infra*), would have raised federal questions and sufficed to invoke removal jurisdiction. City of Chicago, 118 S.Ct. at 530.

Removal jurisdiction would also have been invoked if the sole federal question raised by Schacht had arisen from a claim, other than under Section 1983, on which the district court necessarily had to reach Eleventh Amendment immunity. Federal question claims may be based on a federal statute which, though arguably including the State as a suable entity, does so without the clarity necessary to abrogate Eleventh Amendment immunity. *E.g.*, Dellmuth v. Muth, 491 U.S. 223, 231-32 (1989); Employees v. Missouri Dep't of Public Health and Welfare, 411 U.S. 279, 285 (1973). In that scenario, though a claim against the State might be subject to dismissal only on Eleventh Amendment immunity grounds, a federal question is presented (*e.g.*, Idaho v. Couer d'Alene

Tribe of Idaho, 117 S.Ct. 2028, 2033 (1997); Romero, 358 U.S. at 359) and removal jurisdiction exists (*e.g.*, City of Chicago, 118 S.Ct. at 530).

States and their officials should have at least the same rights as other litigants, when involuntarily brought into court on federal claims, to choose whether to remove to federal court. 28 U.S.C. § 1441. Where removal is based on federal question jurisdiction, it turns on whether claims arise under the Constitution and laws of the United States rather than "the character of the parties." Ames v. Kansas, 111 U.S. 449, 470-72 (1884) (removal of action filed by a State is treated like other removed actions). *See also* Illinois v. City of Milwaukee, 406 U.S. 91, 100-101 (1972). Yet the decision below precludes removal of actions asserting solely federal claims because, based on the character of a defendant being a State, sovereign immunity loomed as a potential reason to dismiss some claims. The decision below deprives States, and any defendants sued with States, of removal rights granted to all defendants.

Removal jurisdiction based on federal question jurisdiction is governed by the same principles which apply when actions commence in district court. That a defendant removing an action is a State or State official is simply irrelevant to determining whether the district court has federal question jurisdiction when the action is removed.

The Seventh Circuit, questioning whether the district court had removal jurisdiction, should have quickly answered its own question, by noting the jurisdictional effect of the individual capacity claims, and moved on to the merits of the appeal. Instead, tossing this Court's detailed maps overboard, it launched a boat onto the open seas and rapidly became adrift. Lost, with only its own inadequate charts providing direction, the Seventh Circuit viewed Eleventh Amendment immunity as a threatening specter which must be purged before removal jurisdiction can be invoked. Had it retained and hewed to this Court's

maps, Eleventh Amendment immunity would have been neither viewed as a threat nor encountered at all. This Court's directions would have rapidly led the Seventh Circuit back to port after a brief side trip, to verify that a State is not a "person" under Section 1983, confirmed that removal jurisdiction was proper and that the merits of the appeal should be reviewed.

II. Section 1983 claims against a State need never be dismissed on Eleventh Amendment immunity grounds since a State is not a "person" under Section 1983.

The Seventh Circuit decision, in transforming the potential that Eleventh Amendment immunity defenses could be raised against Section 1983 claims into defects in jurisdiction at time of removal, ignored a critical analytical stopper. When examining claims against States under Section 1983, federal courts need never consider Eleventh Amendment immunity issues since, as a nonjurisdictional matter, a State is simply not a "person" under Section 1983. Arizonans for Official English v. Arizona, 117 S.Ct. 1055, 1069-70 (1997). The Court reiterated its prior messages that:

> § 1983 actions do not lie against the State [citation omitted]. . . . The barrier [to the § 1983 claims] was not, as the Ninth Circuit [in Arizonans] supposed, Eleventh Amendment immunity, which the State could waive. **The stopper was that § 1983 creates no remedy against a State.**

117 S.Ct. at 1069-70, emphasis added. The claims against the Department, and the official capacity claims against the remaining defendants which sought only monetary relief (J.A. 6), were claims against the State. 117 S.Ct. at

1070, n.24. While dismissal of these claims was predictable at time of removal, there was no need to consider the "barrier" of Eleventh Amendment immunity since the defect was simply that Section 1983 claims cannot be made against a State. 117 S.Ct. at 1069-70.

While citing Arizonans for Official English for the propositions that Section 1983 actions do not lie against States and that courts cannot overlook jurisdictional defects (J.A. 39), the Seventh Circuit itself overlooked the most relevant statement: that the jurisdictional immunity issues need not be considered at all since the "stopper was that § 1983 creates no remedy against a State" (117 S.Ct. at 1069-70). In earlier decisions, the Seventh Circuit recognized that Section 1983 claims against States can instead be dismissed because "[p]ersonhood is an essential element of a § 1983 claim" and "a state is not a 'person' for purposes of § 1983." Lett v. Magnant, 965 F.2d 251, 255 (7th Cir. 1992), *reh. and reh. en banc denied*. When a removed action contains a Section 1983 claim subject to dismissal based on Eleventh Amendment immunity, a federal court need look, and should look, no farther than this definitional bar. Eleventh Amendment immunity could, as a bar to a Section 1983 claim against a State, ultimately drop away based on waiver. Arizonans for Official English, 117 S.Ct. at 1069-70. The critical "stopper" is definitional, not jurisdictional: Congress simply never intended to include States within its definition of "person" in Section 1983. *E.g., id.*, 117 S.Ct. at 1069-70.

This distinction was first sharpened in Will, which examined whether Section 1983 claims could be made against a State in its own courts where Eleventh Amendment immunity is unavailable. 491 U.S. at 63-64. In that setting, Will could expressly separate Eleventh Amendment jurisdictional analysis from the definitional analysis and focus completely on determining Congressional intent through a detailed study of applicable legislative history. 491 U.S. at 64-66. Though Will

considered the existence of Eleventh Amendment immunity, and Congress' presumed respect for it, as confirmation that Congress intended to exclude States from the definition of "person," it established that the definitional bar stood on its own, separate from a State's sovereign immunity, to defeat any Section 1983 claim -- whether in federal **or** State court -- made against a State. 491 U.S. at 66-70. *See also* Howlett v. Rose, 496 U.S. 356, 383 (1990) (reiterating that Congress, "in excluding States and arms of the State from the definition of person" in Section 1983, merely considered immunity principles).

Will underscored that these analyses were separate by leading off its citation to contrary lower court decisions, i.e., those which had "taken the position that a State is a person" under Section 1983, with Della Grotta v. State of R.I., 781 F.2d 343 (1st Cir. 1986). Will, 491 U.S. at 61, n.3. Significantly, Della Grotta had concluded the State was, in that case, a person for Section 1983 purposes **because** it had waived Eleventh Amendment immunity. 781 F.2d at 348-49. The dissent in Will criticized the majority for separating the two analyses and for rejecting the Della Grotta rationale:

> To describe the breadth of the Court's holding is to demonstrate its unwisdom. If States are not "persons" within the meaning of § 1983, then they may not be sued under that statute regardless of whether they have consented to suit. **Even if, in other words, a State formally and explicitly consented to suits against it in federal or state court, no § 1983 plaintiff could proceed against it because States are not within the statute's category of possible defendants.**
>
> This is indeed an exceptional holding. . . . [I]t also renders ineffective the

choices some States have made to permit such suits against them. See, e.g., Della Grotta v. Rhode Island, 781 F.2d 343 (CA1 1986). . . .

Will v. Michigan Dept. of State Police, 491 U.S. 71, 85-86 (1989) (Brennan, Marshall, Blackmun and Stevens, JJ., dissenting), emphasis added. Nothing in the majority opinion suggests that the dissent misread its holdings. Will instead established this definitional analysis as a bar to Section 1983 claims against the States entirely separate from Eleventh Amendment immunity. 491 U.S. at 60-71.

The following term, Ngiraingas v. Sanchez, 495 U.S. 182 (1990) confirmed that the definitional analysis should precede any immunity analysis. Examining whether Section 1983 claims could be made against Territories, Ngiraingas both reemphasized the distinction between these two analyses and clarified that the definitional analysis should be conducted first. 495 U.S. at 183-92. Noting that the appellate court, after concluding that statutory construction excluded any Territory from the meaning of "person" in Section 1983, had not examined Eleventh Amendment immunity (495 U.S. at 185, n.2), the majority, despite criticism by the dissent, also looked first to the definition of "person" in Section 1983 and expressly refrained from any Eleventh Amendment analysis (495 U.S. at 192, n.12).

The Ngiraingas dissent argued for a contrary methodology of examining whether a Territory was entitled to Eleventh Amendment immunity before conducting any definitional analysis. Ngiraingas v. Sanchez, 495 U.S. 193, 202-03 (1990) (Brennan & Marshall, JJ., dissenting). Finding no immunity, they declared their disagreement with the majority: that "the absence of any immunity on the part of Territories from congressional enactments" should have led to a conclusion that a Territory, unlike a State, is a "person" under Section 1983. Ngiraingas, 495

U.S. at 193 (Brennan & Marshall, JJ., dissenting.) Despite these admonitions, the majority consciously refrained, in explaining its decision, from addressing any immunity issues. Ngiraingas, 495 U.S. at 183-92. Indeed, once that definitional analysis resulted in the conclusion that the Territory of Guam was not a "person" under Section 1983, the Court went no further since that "conclusion ma[de] it **unnecessary** to consider Guam's claim of immunity under the Eleventh Amendment." Ngiraingas, 495 U.S. at 192, n.12, emphasis added.

For the decision below to view Eleventh Amendment immunity as an absolute bar to removal was unnecessary and contrary to this Court's designated methods of analysis. If it examined the propriety of removal at all, the decision below should have recognized that, as a definitional and non-jurisdictional matter, Section 1983 claims cannot be made against States and then turned to the merits of the appeal. *E.g.*, Kruse v. State of Hawai'i, 68 F.3d 331, 334 (9th Cir. 1995) (holding that removed Section 1983 claims to which Eleventh Amendment immunity might apply should be dismissed, rather than remanded to State courts, because a State is not a "person" under Section 1983); Office of Hawai'ian Affairs v. Department of Educ., 951 F.Supp. 1484, 1489-90 (D. Hawai'i 1996).

Will, Ngiraingas and Arizonans for Official English clearly signaled that the definitional bar to Section 1983 claims against the State precluded any need to consider Eleventh Amendment immunity. Even if Eleventh Amendment immunity were reached, however, just as the decision below failed to heed those signals on how to analyze Section 1983 claims against States, it also overlooked this Court's directions on how to analyze Eleventh Amendment immunity.

III. Eleventh Amendment immunity defenses are for States to use and control and can never defeat removal jurisdiction.

The Seventh Circuit, asked to review only how the district court had resolved Schacht's individual capacity claims, instead questioned the propriety of removal because Eleventh Amendment immunity was, at time of removal, a potential basis to dismiss other claims. (J.A. 37-38.) The decision below apparently deemed Eleventh Amendment immunity a jurisdictional bar which rendered the district court, in the words of Idaho, "altogether disqualified from hearing certain suits brought against a State." 117 S.Ct. at 2033 (holding that this interpretation "has been neither our tradition nor the accepted construction of the [Eleventh] Amendment's text.")

The Seventh Circuit looked at removal jurisdiction through the wrong end of the eyeglass: examining what the district court could, and did, do after removal rather than whether it had jurisdiction when the case was removed. *E.g.*, NPSA Service Corp., 868 F.2d at 1417; Saint Paul Mercury Indemnity Co., 303 U.S. at 292-93. For the district court to have, at time of removal, remanded because it determined that an Eleventh Amendment immunity defense could prevent otherwise valid federal claims from being adjudicated would have been improper. Though it could have safely predicted, after removal, that the Section 1983 claims against the State would not be tried, those claims unquestionably presented federal questions. Regardless, dismissal, on the nonjurisdictional basis that a State is not a "person" under Section 1983 precluded any need for Eleventh Amendment analysis. Even if a district court is certain, at time of removal, that the only bar to federal claims against a State would be Eleventh Amendment immunity, the claims still present substantial federal questions and support removal jurisdiction. *E.g.*, City of Chicago, 118 S.Ct. at 530.

For the Seventh Circuit to order remand, based on its retroactive conclusion that the district court lacked removal jurisdiction because of a potential Eleventh Amendment bar, was improper. The Seventh Circuit recognized elsewhere that this potential bar is irrelevant to whether a district court has jurisdiction over an action and that it is instead a defense for States, not federal courts, to use and control:

> The doctrine of Eleventh Amendment immunity, though often characterized as jurisdictional, does not function as a true jurisdictional bar. Unlike other forms of subject-matter jurisdiction, Eleventh Amendment immunity can, for example, be waived by consent. [Citation omitted.] The Supreme Court has declared, moreover, that "we have never held that [the Eleventh Amendment] is jurisdictional in the sense that it must be raised and decided by this Court on its own motion."

Komyatti v. Bayh, 96 F.3d 955, 959 n.4 (7th Cir. 1996), *quoting* Patsy, 457 U.S. at 516, n. 19. *See also* Benning v. Bd. of Regents of Regency Universities, 928 F.2d 775, 777, n. 2 (7th Cir. 1991), *as amended, reh. and reh. en banc denied* ("We are not obliged to reach the Eleventh Amendment issue" because, for example, States can waive it by consent). Eleventh Amendment immunity is, by its unique nature, a shield States, not federal courts, control. A State may, at its discretion, use that shield to block a claim entirely, interject it at various times during a federal action, or decline to invoke it at all. Patsy, 457 U.S. at 516, n. 19 (while noting that the State first raised Eleventh Amendment on appeal, never argued it and declined the Court's suggestion of resolution on those grounds, resolving case on other bases and confirming that "[n]othing in this opinion precludes the Board of Regents from raising its Eleventh Amendment claim on remand. . . . ").

Nonetheless, some courts, including panels of the Seventh Circuit, read Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) as requiring federal courts to raise Eleventh Amendment immunity on their own without regard to how, or whether, States choose to use that shield. *E.g.*, Wilson-Jones v. Caviness, 99 F.3d 203, 206 (6th Cir. 1996); Gorka, 82 F.3d at 773; Mascheroni v. Bd. of Regents of University of California, 28 F.3d 1554, 1558-59 (10th Cir. 1994). *See also* Smith v. Avino, 91 F.3d 105, 107-08 (11th Cir. 1996). Such a holding in Pennhurst would have not only usurped the States' control of that constitutional guarantee but conflicted with what Patsy said and did only two years earlier. 457 U.S. at 516, n. 19. Pennhurst did not likely overrule or alter the clear holdings of Patsy -- an action the Court ordinarily makes clear (*e.g.*, California v. Acevedo, 500 U.S. 565, 571-79 (1991) -- without either the majority or dissenting opinions citing Patsy. *See* Pennhurst, 465 U.S. 91-124; Pennhurst State School & Hospital v. Halderman, 465 U.S. 125, 125-26 (1984) (Brennan, J., dissenting); Pennhurst State School & Hospital v. Halderman, 465 U.S. 126, 126-67 (1984) (Stevens, Brennan, Marshall & Blackmun, JJ., dissenting).

Reading Pennhurst as conflicting with Patsy is harder to accept with the Court having reconfirmed, since Pennhurst, that Patsy meant what it said. *E.g.*, Collins v. Youngblood, 497 U.S. 37, 41 (1990) (citing Patsy, as having held that an "Eleventh Amendment defense need not be raised and decided by the Court on its own motion"); Idaho, 117 S.Ct. at 2033. While Idaho, for example, recognized that the term "extend" creates a "point of commonality" in U.S. Const. art. III, § 2 and amend. XI and "could suggest that the Eleventh Amendment, like the grant of Article III, § 2, jurisdiction, is cast in terms of reach and competence, so that the federal courts are altogether disqualified from hearing certain suits brought against a State," it soundly rejected that interpretation:

> This interpretation, however, has been neither our tradition nor the accepted construction of the Amendment's text. Rather, a State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it. The Amendment, in other words, enacts a sovereign immunity from suit, **rather than** a nonwaivable limit on the federal judiciary's subject-matter jurisdiction.

Idaho, 117 S.Ct. at 2033, emphasis added. That the State could, and ultimately did, assert Eleventh Amendment immunity against claims Schacht pled was irrelevant to district court jurisdiction at time of removal. *E.g.*, Idaho, 117 S.Ct. at 2033; City of Chicago, 118 S.Ct. at 530.

Eleventh Amendment immunity sufficiently involves jurisdiction that it is never waived by silence or implication. *E.g.*, Edelman v. Jordan, 415 U.S. 651, 678 (1974). States, however, control its use, not plaintiffs or federal courts. The decision below improperly used Eleventh Amendment immunity against defendants by concluding the district court should have denied defendants their right to remove to federal court because the State was entitled to defend against some claims based on Eleventh Amendment immunity.

Read in context, the statement in Pennhurst which some courts viewed as conflicting with Patsy -- "A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment" -- merely confirmed that, since the State chose, in Pennhurst, to pursue Eleventh Amendment immunity against both federal and pendent claims, federal courts had to respect that **choice** and not restrict the inquiry to the federal claims. 465 U.S. at 121. Admittedly,

the distinctions are confusing. As Justice Thomas observed while an appellate judge:

> Given the wooliness of the concept [of federal jurisdiction], it is hardly surprising that there exists a significant gray area between grounds of decision that clearly are jurisdictional and grounds that clearly are not. . . . [Distinctions made routinely] can prove elusive. [Citations omitted.] . . . To complicate matters further, some provisions --the eleventh amendment, for example--can be jurisdictional in some contexts, and non-jurisdictional in others. *Compare Patsy v. Board of Regents*, 457 U.S. 496, 516, n. 19 . . . (1982) (stating that the eleventh amendment is not "jurisdictional in the sense that it must be raised and decided by this Court on its motion") *with Edelman v. Jordan*, 415 U.S. 651, 678 . . . (1974) ("[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.").

Cross-Sound Ferry Services, Inc. v. I.C.C., 934 F.2d 327, 341 (D.C.Cir. 1991) (Thomas, J., concurring in part).

The confusion remains so infectious that the same judges read these holdings in Edelman, Patsy and Pennhurst as conflicting on some occasions and harmonious on others. *Compare* panel in decision below (J.A. 35) *with* panels in Komyatti, 96 F.3d at 956 and 959 n.4 and Benning, 928 F.2d at 776 and 777, n. 2. The Court should consider reiterating the Collins and Idaho reminders with sufficient prominence here to dispel any further confusion. Eleventh Amendment immunity is not for federal courts to assert on their own -- particularly

against States -- and is, instead, as a doctrine protecting the States, exclusively for States to use and control.

Eleventh Amendment immunity is a shield which a State must choose to use before it can block a federal court claim. If the State properly places that shield in the path of that claim, federal courts are constitutionally required to respect that choice and bar the claim. If, by contrast, the State chooses to turn the shield aside, federal courts are constitutionally required to respect that choice. It may be as offensive to State sovereignty for federal courts to usurp the right of States to make that choice, guaranteed to them by the Eleventh Amendment, as to proceed with a claim the State properly seeks to block. A State is not a legal incompetent for whom choices must be made but instead a fellow sovereign capable under, and designated by, the Constitution to make its own choices about allowing claims to proceed against it. *E.g.*, Idaho, 117 S.Ct. at 2033.

The immunity shield guaranteed by the Eleventh Amendment hardly constitutes, as the decision below assumed, an "Achilles' heel" which bars States from using removal statutes. (J.A. 37.) That metaphor is actually a telling disclosure of how far afield the decision below strayed from proper appellate analysis. Eleventh Amendment immunity is not a breach in a State's protective armor by which a losing opponent may, on appeal, fatally defeat the State's removal efforts. *Cf.* Gorka, 82 F.3d at 773 (Eleventh Amendment immunity should only be a shield against State liability). The decision below went farther than even this metaphor allowed. Schacht, unlike Paris who at least had to fire a well-aimed arrow into Achilles' heel, took no action other than plead federal claims which any court would dismiss.

Still, the "Achilles' heel" metaphor is apt -- to describe the effect on a plaintiff's claim when the State chooses to **invoke** Eleventh Amendment immunity. Until the State not only pulls that arrow out of its quiver but

fires it into the unprotected heel of the plaintiff's claim, that claim proceeds through federal court unfettered by Eleventh Amendment immunity. Patsy, 457 U.S. at 516, n. 19. Unlike Achilles, the claim may well be vulnerable to attack from sources other than the arrow of Eleventh Amendment immunity. *E.g.*, Will, 491 U.S. at 66-70. Like Achilles, however, once the arrow is fired and finds its mark, nothing can revive the claim. Neither plaintiffs nor federal courts may pull the arrow from the State's quiver and use it against the State. Unless Congress, through clear and express language, removed that arrow from the State's quiver (*e.g.*, Employees, 411 U.S. at 285), it is for the State to use or choose not to use.

The Seventh Circuit erred in failing to note that the presence of the individual capacity claims sufficed to invoke removal jurisdiction. Instead the decision below deemed district court jurisdiction absent because the State was entitled to assert Eleventh Amendment immunity defenses to other claims. Dismissing Schacht's Section 1983 claims against the State did not need to turn on whether Eleventh Amendment immunity applied since, as with all claims against States under Section 1983, those claims were fatally flawed at the outset simply as a matter of statutory definition. Though the inquiry should have stopped far short of considering Eleventh Amendment immunity, if considered at all, it should have been recognized for what it is: a defense that States may, in their discretion, use and control. The error in the decision below is particularly egregious since the havoc and disruption it created were not mitigated by any arguably good purposes. It cannot be legitimately doubted that the claims against the State will be dismissed on remand just as they were dismissed in federal court. For no apparent reason, defendants, after devoting considerable State resources to demonstrating in federal court that there was absolutely no merit to any of Schacht's claims, are being required to devote further resources to duplicating that effort in State court.

IV. The claims against the State, properly dismissed in federal district court, would also have been dismissed in State court.

A. Section 1983 claims against States will be dismissed in federal or State court.

The decision below required remand to State court because Section 1983 claims were subject to Eleventh Amendment immunity even though it acknowledged that Wisconsin courts would have also dismissed those claims. (J.A. 39.) The Wisconsin courts would, without question, have dismissed the claims against the Department and the official capacity claims based either on failure to state claims under Rule 802.06(2)(a)6., Wis. Stats., or on sovereign immunity under Wis. Const. art. IV, § 27, or on both grounds. *E.g.*, Lindas v. Cady, 150 Wis. 2d 421, 431, 441 N.W.2d 705 (1989) (State agency not suable for monetary relief under Section 1983 since "states are not 'persons' within the meaning of sec. 1983"); Lindas v. Cady, 142 Wis. 2d 857, 861-62, 419 N.W.2d 345 (Ct. App. 1987), *aff'd in part and rev'd in part*, 150 Wis. 2d 421, 441 N.W.2d 705 (1989). *See also* Boldt v. State, 101 Wis. 2d 566, 584-85, 305 N.W.2d 133 (1981) ("There is no provision in the Wisconsin Statutes giving consent to sec. 1983 or other civil rights actions" against a State agency).

Since the State is not a "person" under Section 1983, the claims potentially barred by sovereign immunity simply failed to state any claim on which relief may be granted. *Compare* Fed.R.Civ.P. 12(b)(6) *with* Rule 802.06(2)(a)6., Wis. Stats. Will, addressing Section 1983 claims made against a State in its own courts, recognized that the definitional analysis, standing alone, always defeats those claims. 491 U.S. at 63-66. Given this definitional bar, what should a district court do with Section 1983 claims made against a State in a removed

action? Weinberger v. State of Wisconsin, 906 F.Supp. 485, 491 (W.D.Wis. 1996), *aff'd*, 105 F.3d 1182, 1185 (7th Cir. 1997) took the proper approach. Section 1983 claims were made against the State of Wisconsin, the plaintiff argued that "defendants should not be permitted to assert Eleventh Amendment immunity because they removed this case from state court" and the district court responded:

> It is true that the Eleventh Amendment is a bar to federal jurisdiction [citation omitted] and has no operative effect in the state courts, but plaintiff's state court suit against the state and against its employees in their official capacities would have gone aground for other reasons. In state court [in Wisconsin], the principle of sovereign immunity protects the state [of Wisconsin] from being sued without its consent. Moreover, neither the state nor its officials acting in their official capacities can be sued under § 1983 in **any** court, state or federal, because they are not "persons" under § 1983. [Citation omitted.] Therefore, even if defendants had not removed this case [from Wisconsin circuit court], plaintiff **could not have** proceeded against the state or against defendant Chester in her official capacity under § 1983.

906 F.Supp. at 491, emphasis added. The appellate court, reviewing the district court decision in Weinberger, noted these sovereign immunity rulings with approval and without, as here, questioning the propriety of removal. 105 F.3d 1182, 1185 (7th Cir. 1997). The Seventh Circuit, in January 1997, affirmed the district court disposition in its entirety (105 F.3d at 1182-88) only to treat the same situation here in an inexplicably contrary fashion in June 1997 (J.A. 35-40.) Weinberger had it right.

B. There was, and is, no need to determine if there is a futility exception to removal statutes.

The Seventh Circuit decision, as in Weinberger, recognized that Wisconsin courts would have dismissed the Section 1983 claims against the State. Unlike in Weinberger, it concluded the district court did not have removal jurisdiction and that Primate Protection League v. Tulane, 500 U.S. 72 (1991) required remand to the State court even though remand was futile. (J.A. 39.) The district court here did have removal jurisdiction and, even if it had not, Primate Protection League does not mandate futile State court remands. Though the Court need not revisit Primate Protection League here, it may, in light of Schacht's exclusive focus on that issue in responding to the petition, wish to assure that question is at least left open for resolution in a future case which more clearly sharpens the competing interests and principles.

Primate Protection League turned on the district court having lacked removal jurisdiction and asked, but did not answer, the question of whether district courts lacking removal jurisdiction must remand to State court when remand would be futile. 500 U.S. at 89. It deemed State court remand necessary, where removal jurisdiction is absent, because of legal and factual "uncertainties" about how the State courts would resolve the claims involved. 500 U.S. at 89. It took "note" that the literal language of 28 U.S.C. § 1447(c) seemed to require remand where the district court lacked jurisdiction but grounded its decision on these uncertainties. *Id.*, 500 U.S. at 89.

The subsequent history of Primate Protection League suggests that, where remand of a removed claim would clearly be futile, a district court should dismiss regardless of whether it had removal jurisdiction. *See* In re Adm'rs of the Tulane Educational Fund, 954 F.2d 266

(5th Cir. 1992), *on remand*, Primate Protection League v. Tulane, 1992 WL 329555 (E.D.La. 1992), *aff'd* 22 F.3d 1094 (5th Cir. 1994), *reh. and reh. en banc denied*, 25 F.3d 1046 (5th Cir. 1994), *cert. denied*, 513 U.S. 1032 (1994). After remand to State court, the case was again removed to the district court. In re Adm'rs of the Tulane Educational Fund, 954 F.2d at 267-68. The district court, concluding that the uncertainties identified in Primate Protection League remained unresolved, remanded to State court once again. In re Adm'rs of the Tulane Educational Fund, 954 F.2d at 268. The appellate court granted mandamus and vacated this second remand order. 954 F.2d at 270 ("The Supreme Court merely declined to speculate on hypothetical circumstances that were not then before it. The problem is now a concrete one . . . .) The Court having declined to review that subsequent Fifth Circuit decision merely meant that, exercising its sound discretion, less than four Justices voted in favor of review. *E.g.*, Maryland v. Baltimore Radio Show, 338 U.S. 912, 917-18 (1950). In that context, Primate Protection League, however, hardly precludes any futility exception in removal cases. (J.A. 39.)

The Third Circuit viewed the comments in Primate Protection League about a futility exception as *dicta* which merely raised, rather than answered, questions. *E.g.*, Bromwell v. Michigan Mutual Insurance Co., 115 F.3d 208, 214 (3rd Cir. 1997) (Primate Protection League "in *dicta*, expressed a reluctance to recognize" a futility exception in removal cases). Other than the Seventh Circuit, the Fourth Circuit has read those comments as a blanket holding that there can never be a "futility exception" to 28 U.S.C. § 1447. *E.g.*, Roach v. West Virginia Regional Jail and Correctional Facility Authority, 74 F.3d 46, 49 (4th Cir. 1996). This court may wish to assure that this question, if not addressed in this case, is left open for resolution in a future case which more clearly sharpens the competing interests and principles.

V. The decision below not only lacks any valid legal support and breaches vital constitutional and statutory guarantees but disrupts effective judicial administration.

Beyond lacking any valid legal grounding and turning vital constitutional and statutory guarantees on their head, the decision below also disrupts effective judicial administration. The decision below is both wrong on theory and wrong in practice.

Frances J., from which the decision below derived, was driven by a perception that the State of Illinois removed a case to federal court to avoid addressing the merits of a particular claim, barred in federal court, as to which no similar State court bar existed. 19 F.3d at 342-43. Judicial amendment of removal statutes and constitutional immunity protections, however, as occurred in Frances J., is not an accepted way to remedy the rare occasion when immunity protections might be manipulated. Behrens v. Pelletier, 116 S.Ct. 834, 840-41, text and nn. 3 and 4 (1996) pointed out that immunity protections should not be diminished to avoid misuse of those protections and that the rare occasions when misuse occurs are easily addressed by the supervisory authority of courts. The open State law question in Frances J. -- whether sovereign immunity would have barred that action in State court (19 F.3d at 342-43) -- could, for example, have been answered surgically, without judicially amending general removal standards, through remand based on abstention. *E.g.*, Huffman, 420 U.S. at 603-08.

Concern that an immunity guarantee may be abused is no reason to destroy the guarantee. It is instructive to recall that Chisholm v. Georgia, 2 Dall. 419 (1793), restricted State sovereign immunity based partly on judicial concern that States could misuse their common law immunity guarantees. Chisholm, 2 Dall. at 456 ("A

dishonest State" should not be able to "insult . . . justice, by declaring *I am a SOVEREIGN State*"). Chisholm "'fell on the country with [such a] profound shock' . . . that the Eleventh Amendment was at once proposed and adopted." B. Schwartz, A History of the United States Supreme Court 21 (1993). *See* Edelman, 415 U.S. at 660-62 (history of how Chisholm caused the Eleventh Amendment).

The decision below so completely turns the protective nature of Eleventh Amendment immunity on its head that district courts bound by Frances J. and its progeny have not read their holdings as broadly as the Seventh Circuit did here. *E.g.*, Smith v. Milwaukee County, 954 F.Supp. 1314, 1318, text and n.4 (E.D.Wis. 1997) (noting holdings in Frances J. and Gorka but declining to remand because the plaintiff there did not object to removal and Eleventh Amendment, though available, was not raised); Weinberger, 906 F.Supp. at 491, *aff'd*, 105 F.3d at 1185.

Even other panels of the Seventh Circuit are apparently so uncomfortable with the consequences of the Frances J. holdings that, examining procedural settings similar to the one addressed in the decision below, they reach contrary conclusions. *E.g.*, Gossmeyer v. McDonald, 128 F.3d 481, 487-89 (7th Cir. 1997) (although official capacity claims were pled in complaint as removed, finding, without citing Schacht, that Frances J. did not require remand to State court); Smith v. Wisconsin Dept. of Agriculture, 23 F.3d 1134, 1139 (7th Cir. 1994) (in a removed action, only the claims against the State were remanded to State court and the district court disposition of other claims affirmed); Weinberger, 105 F.3d at 1185, *aff'g* Weinberger, 906 F.Supp. at 491 (affirming the district court having, in a removed action, granted summary judgment, based on Eleventh Amendment immunity, on claims against State).

Eleventh Amendment immunity allows States, at their option, to avoid the indignity of being subjected to a suit. *E.g.*, Puerto Rico Authority v. Metcalf & Eddy, 506 U.S. 139, 146 (1993). The reasoning of the decision below actually subjects States, and any defendant sued with States, to multiple suits by punishing States for being entitled to Eleventh Amendment immunity. The decision below invites State court litigation, to eliminate claims potentially barred by sovereign immunity, followed by removal to federal court to litigate the remaining claims. It also invites prompt federal court removal where vague pleadings make the bar of sovereign immunity uncertain, to assure removal rights are not lost, followed by federal court litigation on whether that bar exists, State court remand if it does, and ultimately a remand back to federal court once immunity bars are excised. To avoid such indignity to States, and collateral damage to their co-defendants, in the future, the Court should clarify that the potential bar of Eleventh Amendment immunity never deprives a district court of removal jurisdiction under 28 U.S.C. § 1441.

A district court in the Fourth Circuit, which has adopted the Seventh Circuit approach used below, recently expressed dismay at having to hew to that approach by remanding a removed action because, as here, Section 1983 claims against a State were potentially barred by Eleventh Amendment immunity. Lowery v. Prince George's County, Md., 960 F.Supp. 952, 957-59 (D.Md. 1997). Lowery correctly characterized this remand as a "pyrrhic victory" for the plaintiff since those claims would unquestionably be dismissed in any court based on the State not being a "person" under Section 1983. 960 F.Supp. at 959.

The pyrrhic victory for the plaintiff, in Lowery as here, was an actual defeat for our federalist system. The disruption to the careful balance required to maintain that system is detectable, for example, just by examining appealability issues. A State, to preserve its dignatory

interests, has a right to immediately appeal from interlocutory denials of Eleventh Amendment immunity. *E.g.*, Puerto Rico Authority, 506 U.S. at 146. If the decision below stands, however, a State would have **no** appeal from district court remands under 28 U.S.C. § 1447(c) when Eleventh Amendment immunity is used against States to prevent removal. *E.g.*, Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 342-43 (1976) (no appeal when remand, even if erroneous, is purportedly based on 28 U.S.C. § 1447(c)).

It can hardly be said errors would not occur in determining Eleventh Amendment immunity issues. Plaintiffs sometimes allege "official capacity" claims so vaguely that it takes years, and multiple levels of courts, to sort out the allegations. *E.g.*, Shockley v. Jones, 823 F.2d 1068, 1070-72 (7th Cir. 1987) (difficult to detect Eleventh Amendment problems in vague pleadings); Jensen v. State Bd. of Tax Com'rs of State of Indiana, 763 F.2d 272, 278 (7th Cir. 1985) (same). The decision below creates a rule under which an action may have to proceed through an entire State court system, to determine if State sovereign immunity bars a federal law claim, before the action can be removed to federal court. If the defendants guess correctly that the complaint alleged a claim barred by sovereign immunity, it could be years after the complaint is filed before removal is allowed. If the defendants guess incorrectly that the complaint alleged a claim barred by sovereign immunity, they would have forfeited the removal right years earlier. If defendants promptly remove to federal court as a precaution, and the federal courts ultimately determine a claim was barred by immunity, all of the effort expended, as in this case, will have been wasted. This is no way to run a judicial system.

Federal courts will, at times, properly examine removed complaints to determine whether plaintiffs tried to avoid removal by "'artful[ly] casting their essentially federal law claims' as state-law claims." Federated

Department Stores, Inc. v. Moitie, 452 U.S. 394, 397, n.2 (1981). Federal courts also take care, as a general matter, to assure "compliance with the intent of Congress [is not] avoided through mere artful pleading." Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 324 (1981).

The decision below, if it stands, would indiscriminately reward both artful and artless pleading for, either intentionally or inadvertently, making fatally flawed federal claims against States. Patently frivolous or baseless claims against States would, under the reverse logic articulated by the Seventh Circuit, bar **States** and their officials from exercising rights Congress intended to grant all defendants.

The central problem with the decision below is that neither a sovereign State nor defendants sued with States should be treated as second-class litigants when federal claims are made against it. State officials, distracted from the public's business to defend against baseless claims seeking to hold them personally liable, should not, **because** they are public servants and also sued officially, be deprived of rights which all defendants are guaranteed. An alternative approach more respectful of state sovereignty would view Eleventh Amendment immunity as a shield which States can use, not a weapon to be used against States and any defendant sued with States.

Simply because of the individual capacity claims, the district court plainly had removal jurisdiction. Since Section 1983 claims against the State may be dismissed as a matter of statutory definition, Eleventh Amendment immunity need never have been considered. Even in cases where the only bar to a federal claim is Eleventh Amendment immunity, however, it is for the State, not plaintiffs or any federal court, to assert and pursue that bar. Beyond being unsupported by valid legal principles and disruptive to vital constitutional and statutory

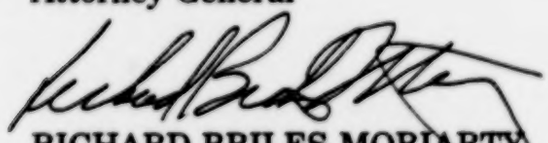
guarantees, the decision below promotes wasteful and ineffective judicial administration. Applying its "due concern for the Eleventh Amendment's role as an essential component of our constitutional structure" (Dellmuth, 491 U.S. at 228) and its supervisory authority over the federal courts, this Court should not allow the Seventh Circuit decision to stand.

CONCLUSION

Defendants ask that the decision below be reversed.

Respectfully submitted,

JAMES E. DOYLE
Attorney General



RICHARD BRILES MORIARTY
Assistant Attorney General
State Bar No. 1017190

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796

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Supreme Court of the United States

October Term, 1997

WISCONSIN DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF ON THE MERITS FOR RESPONDENT

DAVID E. LASKER
Counsel of Record
LASKER LAW OFFICES, S.C.
Tenney Plaza – Suite 800
3 South Pinckney Street
Madison, Wisconsin 53703
(608) 255-8400

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Is there a "futility exception" to the mandate of 28 U.S.C. § 1447(c) such that an action should not be remanded to state court, when the action was brought under 42 U.S.C. § 1983 containing claims against a state agency and state officials in their official capacities and was removed to federal court by those defendants without waiving their Eleventh Amendment immunity?

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JURISDICTION

Respondent is satisfied with the statement on jurisdiction in the Brief for Petitioners on the Merits at 3, except for the assertion therein that the district court had jurisdiction under 28 U.S.C. § 1441. Respectfully, that presupposes the outcome regarding the issue presented in this case, and as explained in detail below, the district court did not have original jurisdiction under 28 U.S.C. § 1441(a).

STATEMENT OF THE CASE

The following supplements the Statement of the Case in the Brief for Petitioners on the Merits at 7-8.

This action was commenced by respondent Keith D. Schacht by the filing of the Complaint in Dane County Circuit Court in the State of Wisconsin on December 13, 1995. Record 2 and 6. In the Complaint respondent named as defendants the agency that had terminated his employment, the Wisconsin Department of Corrections, and the state officials who had participated in the alleged wrongful termination, including the warden of Oakhill Correctional Institution, the associate warden, the personnel manager, and a captain and a lieutenant at the institution where the respondent had served as a correctional officer. Joint Appendix (hereinafter referred to as "App.") 1-2. The individual defendants were sued personally and in their official capacities. *Id.*

The Complaint alleges that the plaintiff began his employment with the Wisconsin Department of Corrections on October 25, 1982 and worked as a correctional officer receiving only favorable performance reviews until his termination on February 18, 1993. App. 3-5. The Complaint further alleges these facts: on January 20, 1993 Schacht had brought some butter into the institution intending to give it to a fellow officer who had earlier purchased seafood from Schacht in a sideline business he maintained; at the end of the shift on the morning of January 21, 1993 defendant Captain Laliberte detained Schacht and conducted an unwarranted search of his backpack, producing the butter and miscellaneous personal items including a three-ounce tube of Colgate toothpaste, two black pens, and three red pens; Laliberte wrongfully determined that those items were the property of the institution when in fact they belonged to Schacht; without making an adequate or reasonable investigation Laliberte immediately suspended Schacht without pay; the defendants disseminated the wrongful accusations of theft throughout the institution, thereby damaging Schacht's good name and reputation; on January 23, 1993 and February 4, 1993 Laliberte interviewed a fellow corrections officer of Schacht, who was his housemate, and who confirmed that Schacht had brought the butter from his home to give it to a fellow employee and confirmed that the pens and toothpaste were also Schacht's personal property; Laliberte and defendant Lieutenant Hepp then conducted sham interrogations of the defendant and a so-called "investigation" in which they maliciously and recklessly disregarded the truth and repeatedly subjected Schacht to harassment in the form of

harangues and false allegations; the interrogations and "investigation" were not for the purpose of discerning the truth and were instead part of a malicious attempt to wrongfully terminate Schacht's employment; ultimately all of the defendants acting in concert with each other, and knowing that there was no reasonable basis for doing so, wrongfully terminated Schacht's employment; and after his termination they disseminated erroneous and defamatory information to third parties which damaged Schacht's reputation and severely impaired his ability to secure subsequent employment. App. 3-6.

The Complaint alleges that the defendants deprived Schacht of his constitutionally protected property interest in continued public employment and his constitutionally protected liberty interest in his good name and reputation and that they caused him to suffer mental anguish and despair, humiliation, ridicule, stigmatization, and embarrassment, and loss of reputation, earnings, and earning capacity. App. 6. Schacht asked for compensatory and punitive damages, attorneys' fees and litigation costs, and "[s]uch other and further relief as the court deems just." App. 7.

On February 2, 1996 the defendants (petitioners in this Court) filed a timely notice of removal of the action in the United States District Court for the Western District of Wisconsin. Record 2. After conducting some discovery, on July 15, 1996 petitioners filed their first substantive motion in the district court, which was a motion for summary judgment requesting dismissal of the Complaint on the grounds, *inter alia*, that Schacht's claims against the State and state officials in their official

capacities were barred under the Eleventh Amendment. Record 18; Record 19 at 3-4; Record 20 at 32.

In his brief in opposition to petitioners' motion for summary judgment in the district court, the respondent stressed that the equitable relief he was seeking included reinstatement and back pay and whatever other injunctive relief would be appropriate and consistent with that result. Record 25 at 2; Record 26 at 12. He emphasized that his legal claims for violations of the Due Process Clause of the Fourteenth Amendment consisted of (1) denial of procedural due process because there was no adequate or fair inquiry in which he could have had a reasonable opportunity to be heard prior to his suspension and termination and (2) denial of substantive due process because he was arbitrarily and capriciously suspended and terminated for no just cause and for what was in fact a malicious and improper purpose. Record 25 at 8-13. Schacht detailed the facts of his case in a sworn affidavit consisting of twenty-two typewritten pages. Record 27. He testified that the true purpose for his termination was to stop him from becoming by seniority first shift officer, because he was not willing to cover up or to allow a "snitch system" in the institution, he disapproved of certain of the staff allowing inmates to break the rules, he would have stopped pilfering from the institution by certain members of the staff, he was uniformly fair and honest with the inmates, and he therefore irritated some of the managerial officers and staff of the prison. *Id.* at 8-10; Record 16. Schacht also submitted a detailed affidavit from a former sergeant at the institution personally acquainted with the facts of his case. Record 28.

The district court granted the motion for summary judgment in its entirety. App. 27-34. Thereby, it dismissed the Complaint and all claims contained therein with prejudice – both the claims against the State agency and its officials sued in their official capacities and the claims against the individual defendants personally. *Id.*

Immediately prior to the final pretrial conference scheduled for September 4, 1996 and the district court's subsequent granting of summary judgment dismissing the Complaint on September 13, 1996, the parties agreed that the major factual issues for trial were whether Schacht was treated fairly and impartially regarding the decision to suspend him and the decision to discharge him from employment and whether he received the process to which he was due regarding the decision to suspend him and the decision to terminate his employment. App. 26.

SUMMARY OF THE ARGUMENT

The Seventh Circuit correctly determined that petitioners had not properly removed this case to federal court. Eleventh Amendment immunity, unless waived by the State, serves to bar federal subject matter jurisdiction over 42 U.S.C. § 1983 claims against the State. Because petitioners had not waived their Eleventh Amendment immunity the district court lacked original jurisdiction under 28 U.S.C. § 1441(a), and the court below properly remanded the action to state court pursuant to 28 U.S.C. § 1447(c).

Petitioners had no need to remove the case from state court. State courts are competent courts of original jurisdiction for the purpose of hearing § 1983 claims. There is no reason that the State would have been harmed had the case remained in state court. The fact that the Eleventh Amendment bars removal by a state does not relegate states to second class citizen status, for states may remove if they waive the Eleventh Amendment immunity.

There is no futility exception to the remand mandate of 28 U.S.C. § 1447(c). This Court's ruling in *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), requires that a federal court remand the entire case when it appears that it lacks subject matter jurisdiction. That jurisdictional bar prevents the federal court from considering whether the case is futile on the merits and subject to dismissal.

It would be unwise for a federal court to speculate about the alleged futility of a remand to state court. Respondent could file amended or supplemental pleadings stating claims under Wisconsin law. Certainly, respondent could proceed in state court on his § 1983 claims against the defendants in their individual capacities whereupon any judgment obtained would be paid by the State under Wisconsin's indemnification statute. A federal court is not the proper forum for the interpretation of state law.

Fundamentals of statutory construction, the intent of Congress, and sound public policy belie petitioners' interpretation of the remand statutes. The language of § 1447(c) is unambiguous and mandates that the action

shall be remanded. Congress has repudiated piecemeal removal and has left no doubt that it intended that there shall be a remand of the entire action under § 1447(c).

ARGUMENT

I. THE ACTION WAS NOT PROPERLY REMOVED TO FEDERAL COURT BY THE PETITIONERS.

In the Brief for Petitioners on the Merits (hereinafter referred to as "petitioners' brief") petitioners attempt to rationalize their removal of the action from state court to federal court without waiving the immunity otherwise guaranteed to them under the Eleventh Amendment. They obscure the fact that the removal was for the purpose of converting the shield of the Eleventh Amendment into a sword designed to eviscerate respondent's requested relief. In removing the action to federal court without intending to waive their Eleventh Amendment immunity, petitioners did not exercise the federal court's removal jurisdiction for reasons traditionally held to underlie the removal statutes enacted by Congress.[1] To

[1] The removal statutes utilized by petitioners in this case, 28 U.S.C. §§ 1441(a) and 1441(b), were originally enacted by Congress for the purpose of insulating litigants against the provincialism that could exist when parties are sued in state court. *See, e.g.*, Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 Fordham L. Rev. 1099, 1108-09 text and nn.42-45 (1995). That consideration evaporates when a state agency or state employees sued in their official capacities are sued in the courts of their own state. In any event, suits in federal court against those defendants are barred under the

the contrary, petitioners' removal was an abuse of the removal statutes.

Nowhere in their brief do petitioners even attempt to state why they would have been harmed by defending the litigation in state court, and indeed no harm conceivably could have fallen upon them by allowing the action to remain in state court. Moreover, the privilege of removal to federal court – if it is indeed the privilege or "right" petitioners assert – was readily available to them merely by waiving Eleventh Amendment immunity. Their failure to do so belies the hollowness of their arguments in this case and the fact that petitioners merely have been playing games with the federal rules to their own strategic advantage. They seek to use the Eleventh Amendment as a "Get-Out-Of-Litigation-Free" card, rather than the "Get-Out-Of-Litigation-In-Federal-Court" card that the Eleventh Amendment was intended to be.

A. Unless The State's Eleventh Amendment Immunity Was Waivable And Waived By Petitioners, The Removal Of The Action To Federal Court Was In Violation Of The Removal Statutes.

As is discussed in detail below, this case presents a straight-forward question of statutory construction. The issue is whether the district court had "original jurisdiction" within the meaning of 28 U.S.C. §§ 1441(a) and 1441(b) and, if not, whether the action should be remanded to state court under the mandate of 28 U.S.C. § 1447(c). In this case, as the Seventh Circuit held, the

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Eleventh Amendment and this Court's holding in *Hans v. Louisiana*, 134 U.S. 1 (1890).

district court lacked original jurisdiction because petitioners were immune from suit in the federal court although they were not immune from suit in state court. Because of the shield of the Eleventh Amendment, the only way petitioners could have properly removed the action to federal court was if they expressly and unconditionally renounced their Eleventh Amendment immunity, which they have refused to do. Instead, petitioners removed the action and urged dismissal of most of respondent's claims on Eleventh Amendment grounds. Indeed, by arguing that the district court lacked jurisdiction over the institutional and individual defendants sued in their official capacities, petitioners effectively were conceding that removal was inappropriate under § 1441(a). Eleventh Amendment immunity is not an affirmative defense, which must be asserted or it is waived. To the contrary, Eleventh Amendment immunity is there until and unless it is waived.

When petitioners removed the action on February 12, 1996, it was well-settled that the Eleventh Amendment applies to actions arising under 42 U.S.C. § 1983. *See, Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984) ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. . . . This jurisdictional bar applies regardless of the nature of the relief sought."); *Quern v. Jordan*, 440 U.S. 332, 338-341 (1979) (The section of the Civil Rights Act of 1871 which creates a cause of action under 42 U.S.C. § 1983 for deprivation of civil rights under color of law did not abrogate the Eleventh Amendment immunity of the states.); *Alabama v. Pugh*,

438 U.S. 781, 782 (1978) ("There can be no doubt . . . that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit."); *Hutto v. Finney*, 437 U.S. 678, 699 (1978) (Although the suit against prison officials was, for all practical purposes, brought against the State, plaintiffs were prevented by the Eleventh Amendment from suing the State by name.); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-448 (1976) (Only language as specific as that in the 1972 Amendments to Title VII of the Civil Rights Act of 1964 regarding employment discrimination on the basis of race, color, religion, sex or national origin is adequate to abrogate "the shield of sovereign immunity afforded the State by the Eleventh Amendment."); *Edelman v. Jordan*, 415 U.S. 651, 663, 678 (1974) (A suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.); *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459, 464 (1945) ("[W]hen the action is in essence one for the recovery from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."); *State of Missouri v. Fiske*, 290 U.S. 18, 26 (1933) (Suit by an individual against a state cannot be entertained on the ground that the controversy arises under the Constitution or laws of the United States.); *Ex parte State of New York*, 256 U.S. 490, 497 (1921) ("[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given."); *Hans v. Louisiana*, 134 U.S. 1, 10 (1890) (A suit cannot be

entertained by a citizen against his own state on the ground that the controversy arises under the Constitution or laws of the United States.).

Since the Complaint that was filed in state court named the Wisconsin Department of Corrections and certain of its officers in their official capacities as defendants, the action should not have been removed by petitioners. The claims against those defendants were barred from suit in federal court by the Eleventh Amendment. *Id. See also, Frances J. v. Wright*, 19 F.3d 337 (7th Cir. 1994), *cert. denied*, 513 U.S. 876 (1994). That petitioners knew the action as removed contained claims barred under the Eleventh Amendment is patent from the fact that they promptly moved the district court for summary judgment dismissing those claims on Eleventh Amendment immunity grounds and received the requested relief. App. 30.

Under the circumstances, the action should not have been removed under 28 U.S.C. § 1441. The district court lacked subject matter jurisdiction under § 1441, because respondent's claims against the department and the defendants sued in their official capacities were barred from suit in federal court. *See, supra* at 9-11. Thus, the action as pled by respondent and filed in the forum of choice by respondent was not one over which the district court would have had original jurisdiction. *See, infra* at 18-19. Therefore, the action did not qualify as one susceptible to removal under 28 U.S.C. § 1441(b).

The jurisdictional bar to removal easily could have been lifted by petitioners themselves. All they had to do was waive – that is, file an explicit written waiver of

Eleventh Amendment immunity which has the effect of curing the jurisdictional problem. *Cf., e.g., Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1069 (1997) (The State of Arizona expressly waived its right to assert the Eleventh Amendment as a defense to the award of damages.).

Petitioners argue that there is no jurisdictional problem because the Department of Corrections and the defendants sued in their official capacities are not "persons" under § 1983 and therefore are not suable entities. Petitioners' brief at 15-19. However, because they are not suable in their official capacities does not mean that they are not suable under some other state law theory or in their individual capacities. *See, infra* at 39-40. Petitioners build their argument upon *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) and *Arizonans. Id.* They mistakenly construe both cases to apply to the case at bar and conclude that because some of the petitioners are not "persons" under § 1983 there was not an Eleventh Amendment problem with their removal of the action from state court. Their argument therefore presents a conundrum: if they are correct that they are not "persons" for the purposes of the Eleventh Amendment, then they are not state actors. For numerous reasons their argument is misplaced.

First, it presupposes, erroneously, that the question of whether respondent stated a claim upon which relief can be granted should be determined before the question of whether the district court had proper subject matter

jurisdiction. *See id.*[2] The true question raised by petitioner's argument about a state not being a "person" under § 1983 is the question of whether a claim exists against the State and state officials upon which relief can be granted. The flaw in the argument is in the answer to this question: which comes first, the jurisdictional analysis or the "definitional analysis?"

The answer to that question has been clear for well over a century. As the Court said just recently, "[T]he first and fundamental question is that of jurisdiction. . . . " *Steel Company v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1012 (1998). Only if the parties have properly invoked the limited subject matter jurisdiction of the federal courts is it appropriate to assess whether the Complaint states a valid claim. The determination of whether a claim has been stated upon which relief can be granted must come second, because " 'without jurisdiction the court cannot proceed at all in any cause.' " *Id., quoting Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.' " *Id., quoting Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

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[2] Petitioners refer, at 16, to their suggested procedural device as "definitional" or "the definitional analysis." This phrase, which petitioners invent, appears to be a shorthand reference to the inquiry as to whether a complaint states a claim upon which relief can be granted.

It is axiomatic that, when one makes a motion to dismiss raising both issues of jurisdiction and sufficiency of the pleadings, the court looks first to the issue of jurisdiction. Only if the court has jurisdiction does it go on to reach the question of whether the plaintiff has stated a claim for relief. The propriety of this approach in the domain of Eleventh Amendment jurisprudence is clear. *See, e.g., Edelman*, 415 U.S. at 678 (the Eleventh Amendment is in the nature of a jurisdictional bar); *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 480-82 text and n.10 (1987). *See also, Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 150 (1993) (Stevens, J., dissenting) ("[A] defense based on the Eleventh Amendment, even when the Amendment is read at its broadest, does not contend that the State or state entity is shielded from liability for its conduct, but only that the federal courts are without jurisdiction over claims against the State or state entity. . . . [T]he Eleventh Amendment only determines where, or more precisely, where not, that suit may be brought.").

Will and *Arizonans* are not dispositive in this case for various reasons. First, as Justice O'Connor wrote for an undivided Court in *Hafer v. Melo*:

> Most certainly, *Will*'s holding does not rest directly on the Eleventh Amendment. Whereas the Eleventh Amendment bars suits in federal court "by private parties seeking to impose a liability which must be paid from public funds in the state treasury," *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 1355, 39 L.Ed. 2d 662 (1974), *Will* arose from a suit in *state* court. We considered the Eleventh Amendment in *Will* only because the fact that Congress did not intend to override state immunity when it enacted § 1983 was relevant to statutory construction. . . .

Hafer v. Melo, 502 U.S. 21, 30 (1991) (emphasis in the original). *See also, Will*, 491 U.S. at 66 ("This does not mean . . . the scope of the Eleventh Amendment and the scope of § 1983 are not separate issues. Certainly they are."). While *Will* held that a state is not a "person" under § 1983, it did so in the context of a case filed in state court and coming to this Court from the Supreme Court of Michigan, and it did not involve the issue of removal that is extant in the case at bar. *Id.*

Petitioners argue, as if it is the *coup de grâce*, that the fact that a state is not a "person" under § 1983 is "The stopper" or "The critical stopper." Petitioners' brief at 15, 16. For that proposition they rely upon *Arizonans*, which said in the context of that case, "The stopper was that § 1983 creates no remedy against a State." 117 S.Ct. at 1070.

However, petitioners misconstrue why the Court said it was "The stopper" in *Arizonans*. In that case, the State of Arizona expressly waived its right to assert the Eleventh Amendment as a defense to the award of nominal damages. *Id.* at 1069. The action had been commenced in federal court, and removal was not an issue. *Id.* at 1060. The issue before the Court was mootness. *Id.* at 1069. It was in that context that the Court held that, "the claim for relief the Ninth Circuit found sufficient to overcome mootness was nonexistent." The "stopper" in *Arizonans* regarded the question of whether the plaintiff had stated a claim for relief that was not moot and had nothing to do

with the Eleventh Amendment or subject matter jurisdiction. Thus, what was the stopper in *Arizonans* is not at issue in this case.

While petitioners pursue the red herring of the possible application of *Will* and *Arizonans*, the fact remains that the limited scope of § 1983 and mootness have nothing to do with the Eleventh Amendment and subject matter jurisdiction. Petitioners confidently predict that a judge of any court – state or federal – would conclude as the district judge did in this case that respondent has failed to state a claim against the State and the state officials. Petitioners' brief at 27-28. But that prediction is off target.[3] *See* Section II.B., *infra* at 39-41. Because the federal courts lack subject matter jurisdiction in this case, it is inappropriate to speculate. *Id.* at 38-39. However, even if such speculation were warranted, the outcome of this litigation upon remand to state court is anything but certain. At an absolute minimum, the state court would allow respondent to pursue his claims against the defendants sued in their individual capacities. Damages and retroactive injunctive relief still will cost the State treasury, because a judgment against those defendants as individuals nonetheless will be paid by the State under its indemnification statute. *See, infra* at 29 n.14. Further, the possibility exists that respondent may be able to proceed against the State and state officials for damages resulting

[3] Of course, if petitioners were so confident, why did they go through the time and expense of removing the action to federal court rather than asking the state court to dismiss? In any event, as explained in detail below, because the federal court lacked subject matter jurisdiction any decision on the merits should be made by the state court.

from their breach of respondent's rights under the Wisconsin Constitution. *See, infra* at 40.

All respondent must show in this case is that there is a legitimate concern about the applicability of the Eleventh Amendment as a bar to claims in this case, because 28 U.S.C. § 1447(c) provides that remand of the entire action is required "when it appears that the district court lacks subject matter jurisdiction." *See* Section II.A., *infra* at 29-38. In this case there is more than ample reason to hold that respondent's claims for relief implicate the Eleventh Amendment.

Petitioners fault the Seventh Circuit for raising the issue of subject matter jurisdiction under the Eleventh Amendment on its own initiative, and they cite the oft-quoted passage from *Patsy v. Board of Regents*, 457 U.S. 496, 515 n.19 (1982), that "we have never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion." Petitioners' brief at 21. Petitioners misconstrue the footnote from *Patsy*, which they refer to repeatedly and ultimately mislabel as "the clear holdings of *Patsy*." *Id.* at 22.[4]

First, the defendant Board of Regents in *Patsy* had requested that the Supreme Court not address the Eleventh Amendment question so that the Court would rule solely on the question of whether exhaustion of state

[4] *Patsy*, of course, dealt exclusively with the issue of whether exhaustion of state administrative remedies was a prerequisite under § 1983, and the Court explicitly chose not to address Eleventh Amendment issues. 457 U.S. at 515 n.19. To attempt to shoe-horn *Patsy* into this case necessarily misconstrues the footnote.

administrative remedies was a prerequisite to an action under the Civil Rights Act of 1871. 457 U.S. at 515 n.19. The full quotation that is relevant from *Patsy* explains that the reason the Court has never held that Eleventh Amendment immunity is jurisdictional in the sense that it must be raised and decided by this Court on its own motion was "because of the importance of state law in analyzing Eleventh Amendment questions and *because the State may, under certain circumstances, waive this defense. . . .* " *Id.* (emphasis added). Following the complete quotation is a citation inviting comparison to *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 279 (1977). *Id.* In *Mt. Healthy*, the Court actually did take up the issue of Eleventh Amendment immunity, saying:

> The District Court found it unnecessary to decide whether the Board was entitled to immunity from suit in the federal courts under the Eleventh Amendment, because it decided that any such immunity had been waived by Ohio Statute and decisional law. . . . We prefer to address instead the question of whether such an entity had any Eleventh Amendment immunity in the first place, since if we conclude that it had none it will be unnecessary to reach the question of waiver.

429 U.S. 274 at 279. Thus, *Patsy* hardly stands for the proposition that it was improper for the Seventh Circuit to address the issue in this case – a case in which the district court ruled against respondent on Eleventh Amendment grounds dismissing substantial claims.

The central question in a case such as the case at bar was identified in *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702 (1971), in which the Court said:

> Longstanding decisions of this Court make clear . . . that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.[5]

In order to determine whether the remand mandate of 28 U.S.C. § 1447(c) should be invoked in this case, the focus should be upon the question of whether the federal district court would have had original jurisdiction of the case had it been filed in that court. *Id.* For the reasons stated above, it clearly lacked subject matter jurisdiction over all claims made in the Complaint because of the Eleventh Amendment and the *Hans*[6] doctrine.

Petitioners argue that, "Had Schacht filed this action in federal district court, it would have had jurisdiction over the individual capacity claims on which the appeal focused." Petitioners' brief at 10. For two reasons, however, that statement only begs the question. First, because

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[5] In the instant action, of course, the case has not been tried on the merits without objection, and the federal court has granted summary judgment. Presumably, had the Seventh Circuit heard the appeal on its merits and reversed the granting of summary judgment, on remand Schacht prior to trial could have objected to the defects in the removal procedure to which he had not objected prior to the granting of summary judgment. Thus, it was even more appropriate for the Seventh Circuit to raise the issue at the time that it did. That actually served the purpose of judicial economy.

[6] *Hans v. Louisiana*, 134 U.S. 1 (1890).

the case was removed by petitioners, respondent necessarily focused upon those claims that remained viable in federal court and not on the other claims raised by the Complaint as it was filed in state court. Secondly, the action was not filed in federal district court, so here the issue arises out of the fact that Schacht chose to file in state court, not in federal court, a right and a choice that no one disputes Schacht had. As was succinctly stated by Judge Gordon in *Gibson v. City of Glendale Police Department*, 786 F.Supp. 1452, 1457 (E.D. Wis. 1992):

> The well-known purpose of 42 U.S.C. § 1983, with its origin in § 1 of the Civil Rights Act of 1871, was to provide a federal forum for civil rights plaintiffs. The purpose was implemented out of a concern that those who had been deprived of their constitutional rights by persons acting under color of the laws of a state would otherwise be forced to attempt to vindicate those rights in the courts of that very state. That purpose is not disserved where, as here, it is the intended beneficiary of § 1983 – the civil rights plaintiff – who elects to litigate in a state forum. (Citations omitted)

Petitioners claim that, "Removal jurisdiction would have been invoked if the district court only had federal question jurisdiction over one of several removed claims." Petitioners' brief at 12.[7] Petitioners erroneously

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[7] Not surprisingly, that sentence is not followed by a citation or reference to any authority. The text of §§ 1441(a) and 1441(b) states that an "action" not "claim" may be removed, and the notion of a district court accepting jurisdiction over an isolated claim is inconsistent with judicial interpretations of the removal statutes and is unprecedented. In arguing as they do in this sentence, petitioners contradict themselves. The point they are making in this sentence is at odds with the assertion that they make that they "had to join together to remove since only a single controversy was alleged." Petitioners' brief at 10-11, *citing Chicago, R.I.&P. Ry. Co. v. Martin*, 178 U.S. 245, 247-48 (1900).

attempt to build an argument in support of that proposition on the basis of this Court's recent decision in *City of Chicago v. International College of Surgeons*, 118 S.Ct. 534 (1997). *Id.* at 11-14. They cite to *City of Chicago*, 118 S.Ct. at 530, for the proposition that, "[S]tate law claims could not make removal improper since the 'federal claims suffice to make the actions "civil actions" within the "original jurisdiction" of the district courts for purposes of removal. § 1441(a).' " *Id.* at 12-13. Yet, *City of Chicago* is inapposite because it did not involve a state defendant or the Eleventh Amendment. It involved a mix of federal claims and state claims subject to pendent or supplemental jurisdiction – not a single core of facts and federal legal issues as exists in this case. Moreover, repeatedly – in 1875, 1948 and 1990 – Congress repudiated piecemeal removal of claims. Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 Fordham L.Rev. 1099, 1148 (1995).

Nothing in *City of Chicago* changes what was said by this Court in *Edelman* and its progeny: "The Eleventh Amendment . . . partakes of the nature of a jurisdictional bar. . . . " *Edelman*, 415 U.S. at 678. In the context of the removal by a state of an action brought exclusively under 42 U.S.C. § 1983, that jurisdictional bar necessarily should

be considered a bar to the federal court's "original jurisdiction." Certainly, nothing in *City of Chicago* can be construed to the contrary.

Likewise, petitioners' citations to other cases of this Court are inappropriate. They refer, at 13 and 14, to *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359 (1959), but that case did not involve an issue of federal jurisdiction over a state defendant. They cite, at 13, *Delmuth v. Muth*, 491 U.S. 223, 231-32 (1989) and *Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279, 285 (1973), but those are cases in which the court found Eleventh Amendment immunity to exist, thus disposing of the claims in federal court against the state defendants. At 13-14, they cite *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S.Ct. 2028, 2033 (1997), but *Idaho* was brought in federal court, not removed to federal court, and nothing in the Court's opinion foreclosed the possibility that the claim could have been litigated in state court. At 14, they cite *Ames v. Kansas*, 111 U.S. 449, 470-72 (1884), but that was a case in which the action was brought *by* a state and removed by a private corporation. Finally, at 14, they cite *Illinois v. City of Milwaukee*, 406 U.S. 91, 100-101 (1972), and again that case involved an action filed by a state, this time against a municipal defendant.

These citations are as unpersuasive as petitioners' argument that removal should not be based upon "the character of a defendant being a State" and their argument that "removal rights" are "granted to all defendants." *See* petitioners' brief at 14. Naturally, the character of the defendant is relevant, because defendants are the parties who seek removal. Removal rights

are granted to all defendants – except that special and unusual class of defendants who have Eleventh Amendment immunity and seek removal without being willing to waive it.

The gist of petitioners' argument is contained in this sentence from their brief, at 14: "That a defendant removing an action is a State or a State official is simply irrelevant to determining whether the district court has federal question jurisdiction when the action is removed." The problem for petitioners is twofold. First, they offer no citation or other reference to authority following that sentence, and there is none available to them. Secondly, they mistake the issue, which is whether the federal court has original jurisdiction under § 1441(a), not federal question jurisdiction under § 1441(b).

The peculiarity of petitioner's choice to seek removal in a case which had obvious Eleventh Amendment problems is inescapable. It is the same irony that was underscored by Judge Flaum writing for the Seventh Circuit in *Frances J.*. *See* 19 F.3d at 340 ("We are curious why Defendants would engage in such a paradoxical jurisdictional maneuver, unless they merely had hoped to split the prospective relief claims from those that are retrospective in nature."). That concern, reflected in the holding of *Frances J.*, the holding of the Seventh Circuit in the instant action, and the holdings of the Seventh Circuit and the other circuits that are consistent with it,[8] is a legitimate concern, and the holdings are important for the purpose of nipping in the bud the urge of every trial lawyer –

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[8] *See* cases *infra* at 35-37.

whether for plaintiffs or defendants – to play fast and loose with the rules of civil procedure.[9]

Petitioners make a lengthy argument about the alleged attempt of the Seventh Circuit to control their Eleventh Amendment immunity defense (petitioners' brief at 20-26), which appears to be based upon a misconception of the Eleventh Amendment. They say, "Eleventh Amendment immunity is, by its unique nature, a shield States, not federal courts, control." *Id.* at 21. However, in fact, their only control is to waive the immunity or not to waive it – knowing full well that if it is not waived, it may be raised by the district court, the court of appeals, or this Court *sua sponte*. *Mt. Healthy*, 429 U.S. at 279. Petitioners say, "States . . . control its use, not plaintiffs or federal courts." Petitioners' brief at 23. However, the states really only control waiver of the immunity – not the effect of the Eleventh Amendment when the state chooses to remove without consenting to

[9] Petitioners warn that under what they call "the reverse logic articulated by the Seventh Circuit" there would be a problem of plaintiffs injecting "[p]atently frivolous or baseless claims" into complaints to bar states from removing actions to federal court. Petitioners' brief at 35. However, this worry over what we might call a "poison pill" is not well founded. First, a patently frivolous or baseless claim presumably would be dismissed early on by the state court on the state's own motion, whereupon removal would be a readily available option under 28 U.S.C. § 1446(b). Furthermore, the alleged problem of frivolousness should be dealt with effectively by either Fed. R. Civ. P. 11 or its functional equivalent in each respective state, which in Wisconsin is § 814.025, Wis. Stats.

waiver.[10] They argue, "Eleventh Amendment immunity is not for federal courts to assert on their own – particularly **against** the states. . . . " *Id.* at 24-25 (bold-face type in the original). However, the Seventh Circuit in this case did not use the Eleventh Amendment against *the State*. It ruled against the notion that states may remove actions with claims that are barred under the Eleventh Amendment while at the same time not consenting to waiver of their Eleventh Amendment immunity. App. 38-40. Finally, petitioners argue that they have the right to shoot at the "Achilles' heel" of "a plaintiff's claim when the State chooses to **invoke** Eleventh Amendment immunity." *Id.* at 25 (bold-face type in the original).[11] This considerably cavalier assertion demonstrates how privileged the State believes it should be. Yet, a state does not truly invoke the Eleventh Amendment. It is simply there, at all times, in the Constitution, unless the state chooses to waive it.[12]

[10] Petitioners display a bizarre notion of what the Eleventh Amendment does and how it applies. In their zeal to win, the State seems to turn Eleventh Amendment jurisprudence on its head. They say they control or "invoke" Eleventh Amendment immunity as if it were an issue of venue, res judicata, or other affirmative defense normally presented by motion under Fed. R. Civ. P. 12(b)(6) and waived if not explicitly asserted. However, our understanding of the Eleventh Amendment is very different. It is a broad bar from suit that prevents an action in federal court against a state or state official. *Edelman*, 415 U.S. at 678.

[11] At the end of this quotation and each of the previous three quotations from Section III of petitioners' brief, at 21-25, petitioners offer no citation or authority for their assertions. All four points are pure rhetoric, not statements of law.

[12] Throughout this section of their brief the petitioners seem to have a chip on their shoulder about the existence of the

B. There Was No Need For The State To Remove The Action From State Court.

Petitioners have submitted a long and comprehensive brief, but one omission that calls into question their entire argument is their failure to explain why the State and officials sued in their official capacities did not waive their sovereign immunity when they chose to remove the case to federal court. Why did they have to leave their home court to litigate in federal court?

Petitioners would not have been adversely affected had the case remained in state court. Naturally, one would assume that, if anything, the State would have the home-court advantage in its own court. Certainly, there is nothing in the record evidencing that petitioners would have been harmed if the case had remained in state court or now would be harmed if the state court terminates its

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Eleventh Amendment problem of their own making. It is highly ironic that the respondent finds himself in the role of advocating for the Eleventh Amendment in this Court. It would seem that the Attorney General of Wisconsin and the other attorneys general who have filed the Brief *Amicus Curiae* of 22 States in Support of Petitioner would want to stand on the side of the Eleventh Amendment – claiming its benefits under the Constitution and accepting the responsibilities inherent with it. The only way the Eleventh Amendment bar to removal to federal court can be breached is if the state defendant explicitly and unequivocally waives Eleventh Amendment immunity. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305-06 (1990).

existing order staying proceedings pending the decision in this Court.[13]

Petitioners' argument that the decision of the Seventh Circuit is costly in terms of judicial economy is unpersuasive and cannot conceivably be reconciled with their own behavior. If their true concern were, as they assert, that they should not be subjected to suit because the State and its officials are not "persons" under § 1983, then clearly the action they could have taken which best served judicial economy would have been to move to dismiss in state court. Instead, they make an argument which defies common sense. The fact remains that, if this action would have been dismissed in any court, as they argue, there was no reason to get a second judicial system involved by removing the action to federal court and asking for the relief of dismissal there.

Effectively, there will be little, if any, difference in the time and expense for the parties whether the decision of the Seventh Circuit is affirmed or reversed. If reversed, the matter undoubtedly will have to be re-presented in supplemental briefs and oral argument to the Seventh Circuit on the merits of petitioners' motion for summary judgment. Likewise, if this Court affirms the Seventh Circuit, the same issues will be briefed and argued in the state court. Thus, the record before the Court does not

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[13] Of course, petitioners would prefer to have the litigation at an end. However, the issue of whether the district court's granting of summary judgment should be affirmed or reversed still would be pending in the event the decision of the Seventh Circuit were reversed. Therefore, continued litigation after this Court reaches its decision is certain, either way.

demonstrate harm to petitioners from being confined to state court.

Although they assert they are somehow being denied a "right" or privilege by the decision of the Seventh Circuit, they offer no authority for that claim. They are not, as they claim, relegated to the ranks of second class citizens under the federal removal statutes. If they were allowed removal without waiving their Eleventh Amendment immunity, they would have a clear strategic advantage over the ordinary defendant seeking to remove a federal question case from state court.

There may be important reasons for granting special privileges to state employees. *Cf., e.g., Richardson v. McKnight*, 117 S.Ct. 2100, 2105-2108 (1997) (Many policy considerations underlie the granting of qualified immunity to state employees that do not warrant immunity for private prison guards). Likewise, there are important reasons for extending sovereign immunity to states and state officials in federal court. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*; *Quern v. Jordan*.

While petitioners claim it is important to them to remove the case to federal court, they do not enunciate a viable reason why they have failed to waive their Eleventh Amendment immunity. There is no practical reason for their failure to waive immunity because Wisconsin, like most states, has an indemnification statute which

ensures that a judgment against a state employee in a case such as this will be paid by the State.[14]

One cannot fail to see the true purpose of petitioners in this case, which was and is to refashion the intended shield of the Eleventh Amendment into an effective sword to defend successfully against liability claims. Thus, petitioners' true gripe would appear to be not that they are relegated to second class citizens but, in fact, that they have been deprived of an unfair advantage they have enjoyed over non-state defendants seeking federal question removal from state court.

II. THERE IS NO FUTILITY EXCEPTION TO THE REMAND MANDATE OF 28 U.S.C. § 1447(c).

The critical statute in this case, 28 U.S.C. § 1447(c), states, "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the

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[14] *See* § 895.46(1)(a), Wis. Stats., which provides in pertinent part:

> **State and political subdivisions thereof to pay judgments taken against officers.** (1)(a) If the defendant in any action or special proceeding is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employee in excess of any insurance applicable to the officer or employee shall be paid by the state or political subdivision of which the defendant is an officer or employee. . . .

case shall be remanded." As the previous section of this brief has demonstrated, the Seventh Circuit was correct in determining that it appears the district court lacked subject matter jurisdiction in this case. Although petitioners may argue to the contrary, at 29-30, their contention that any court would dismiss the claims that were dismissed by the federal court in this case under the Eleventh Amendment does stand for the proposition that there is a futility exception to the remand mandate of § 1447(c). In fact, that issue is the crux of the matter in this case and the issue upon which the outcome turns.[15]

A. The Rule Of *International Primate Protection League*, That Remand Is Required When It Appears The Federal Court Lacks Subject Matter Jurisdiction, Should Be Dispositive In This Case.

The Court has made it clear that there is no "futility exception" to the remand mandate of 28 U.S.C. § 1447(c). *See International Primate Protection League v. Administrators*

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[15] The heading of the section of petitioners' brief at 29 states, "There was, and is, no need to determine if there is a futility exception to removal statutes." However, as a practical matter, petitioners are arguing that there is a futility exception – albeit an exception for the purpose of implementing petitioner's conclusion regarding the effect of the rule that a state is not a "person" under § 1983. Petitioners' argument is downright disingenuous, when it is asserted (twice) that the Court should leave the question open "for resolution in a future case which more clearly sharpens the competing interests and principals." Petitioners' brief at 29, 30. It is difficult to imagine a case which could be said to more clearly sharpen the issue of whether there is a futility exception to § 1447(c) than this case.

of Tulane Educational Fund, 500 U.S. 72, 89 (1991) (noting "the literal words of § 1447(c), which on their face, give no discretion to dismiss rather than remand an action"). Whether that was the holding of the Court, which may be in doubt,[16] the Court's reasoning was unmistakable and controlled the disposition of the case.

In *International Primate*, an animal rights group had brought suit in state court seeking to bar Tulane University and the National Institutes of Health (NIH) from euthanizing monkeys and from conducting subsequent autopsy research, and the NIH removed the action to federal court. *Id.* at 74-75. The Court held that the statute authorizing removal of state suits by federal officers does not permit removal by federal agencies and that the animal rights groups had standing to challenge removal. *Id.* at 77 and 79. Having concluded that NIH lacked authority to remove the suit to federal court, the Court proceeded to determine whether the case should be remanded to state court. *Id.* at 87. The Court said, "Section 1447(c) of Title 28 provides that, '[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction [over a case removed

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[16] The Court of Appeals for the Third Circuit recently followed the Court's decision in *International Primate*, although it said that the Court's unwillingness to recognize a "futility exception" had been expressed "in dicta." *Bromwell v. Michigan Mutual Insurance Company*, 115 F.3d 208, 213 (3rd Cir. 1997). However, inasmuch as the Court's handling of the issue under the facts in *International Primate* was explicit and dispositive of the case, it reasonably may be viewed as a determinative ruling on the merits of the issue, as it has been treated by the vast majority of the circuit courts of appeals. *See infra* at 35-38.

from state court], the case shall be remanded.' " *Id.* Then the Court reasoned that, "Since the district court had no original jurisdiction over this case, . . . a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c)." *Id.*

The Court noted that, "NIH asks us to affirm the Court of Appeals' dismissal of this suit on the grounds that a remand of petitioners' claims to Louisiana court would be futile." *Id.* After acknowledging the futility asserted by NIH, the Court said, "[W]e decline to speculate on the proper result." *Id.* at 89. In doing so, the Court expressly noted " 'the literal words of § 1447(c), which, on their face, give . . . no discretion to dismiss rather than remand an action.' " *Id., quoting Maine Association of Interdependent Neighborhoods v. Commissioner, Maine Department of Human Services,* 876 F.2d 1051, 1054 (1st Cir. 1989) (then-Judge Breyer writing for the court). Finally, the Court gave emphasis to the words "shall be remanded" in the wording of 28 U.S.C. § 1447(c). *See id.* ("The statute declares that, where subject matter jurisdiction is lacking, the removed case '*shall* be remanded.' " (emphasis added by the Court in the original)).

Thus, the Court made it abundantly clear that its strict interpretation of 28 U.S.C. § 14[illegible] leaves no room for a "futility exception." That result is consistent with very long standing decisions of this Court. The backdrop of these decisions, of course, is the Article III limitation on the jurisdiction of the federal courts. *Pennhurst,* 465 U.S. at 120. While a court has jurisdiction to decide if it has subject matter jurisdiction, once it decides ~~it has none~~ Article III bars the court from taking further action. *Steel*

Company, 118 S.Ct. at 1012. As the Fifth Circuit said, "The subject matter jurisdiction of federal courts is limited by the Constitution and the Congress, and cannot be expanded by judicial interpretation or by the acts or consent of the parties to a case." *In re Carter,* 618 F.2d 1093, 1100 (5th Cir. 1980) (*citing American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 17-18 (1951)), *cert. denied,* 450 U.S. 949 (1981). In effect, petitioners are suggesting that the Court should render an advisory opinion after it has already decided that there is a lack of subject matter jurisdiction. However, once the Court determines that there is a lack of jurisdiction, that is the end of the matter. *Steel Company,* 118 S.Ct. at 1012.

The Court has said, "The jurisdiction of federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties," noting a long line of cases dating back to and before the Dred Scott Case. *American Fire & Casualty Co.,* 341 U.S. at 17-18 text and n.17. In *American Fire,* the case had been removed without right from state to federal court at the request of the defendant. *Id.* at 17. The federal court lacked original jurisdiction at its inception, and up to and including the time of judgment the district court continued to be without jurisdiction. *Id.* The Court held that the defendant who removed the action was not estopped after judgment from protesting that there was no right to removal. *Id.* at 18. The Court ordered the cause remanded to the district court with directions to vacate the judgment and to remand the case to state court. *Id.* at 18-19. *American Fire* and *International Primate* are both analogous to the case at bar.

The Seventh Circuit correctly followed *International Primate* and its own sentinel case on the subject, *Frances J. v. Wright*. *See Schacht v. Wisconsin Department of Corrections*, 116 F.3d 1151 (7th Cir. 1997) (App. 35-40).[17] The court acknowledged petitioners' argument that "remand would be futile and would result in a waste of judicial resources." 116 F.3d at 1153 (App. 39). It countenanced the same arguments made by petitioners to this Court:

> Specifically, the defendants contend that if we remand, the state court will simply dismiss the official capacity claims and the claims against the WDOC for failing to state a claim on which relief may be granted, or on grounds of sovereign immunity, and duplicate the analysis the district court devoted to the remaining claims. See *Lindas v. Cady*, 441 N.W.2d 705, 709 (Wis. 1989) (noting that "states are not 'persons' within the meaning of sec. 1983"). See also *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1069 (1997) (noting that "sec. 1983 actions do not lie against a State").

Id. Then, relying upon the most recent applicable decisions from this Court, the court said:

> Even if the defendants have accurately forecast the fate of this case on remand, we are not

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[17] Although petitioners criticize the Seventh Circuit for reaching out to raise the issue of subject matter jurisdiction, under the facts of this case it was obliged to do so. *See Arizonans*, 117 S.Ct. at 1072 ("When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purposes of correcting the error of the lower court in entertaining the suit." (*quoting Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), *quoting in turn United States v. Corrick*, 298 U.S. 435, 440 (1936).)).

> free to disregard a jurisdictional defect. See *Arizonans*, ___ U.S. at ___, 117 S.Ct. at 1071. Contrary to their suggestion, there is no "futility exception" to § 1447(c). The Supreme Court noted that the literal words of § 1447(c) leave no room for such an exception. See *Primate Protection League v. Tulane Educational Fund*, 500 U.S. 72, 89, 111 S.Ct. 1700, 1710, 114 L.Ed. 2d 134 (1991). See also 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded.") (Emphasis added).

Id. The disposition of the instant action by the court below – rejecting the same arguments made by petitioners – was consistent with all applicable guideposts from this Court and was correct.

Since the decision in *International Primate*, petitioners' proposed "futility exception" has been expressly rejected by the circuit courts of appeals for the Third, Fourth, and Seventh Circuits. *See Bromwell v. Michigan Mutual Insurance Company*, 115 F.3d 208, 214 (3rd Cir. 1997) ("[W]e hold that when a federal court has no jurisdiction of a case removed from a state court, it must remand and not dismiss on the ground of futility."); *Roach v. West Virginia Regional Jail and Correctional Facility Authority*, 74 F.3d 46, 49 (4th Cir. 1996) (noting that "the futility of a remand to the West Virginia state court does not provide an exception to the plain meaning of § 1447(c)"); *Schacht*, 116 F.3d at 1153 (App. 39) (holding that "there is no 'futility' exception to § 1447(c)"); *Gorka By Gorka v. Sullivan*, 82 F.3d 772, 774-775 (7th Cir. 1996) (following the holding in *Frances J.* that the entire case should be remanded, if the federal court does not have original jurisdiction because

of a claim barred by sovereign immunity); *International College of Surgeons v. City of Chicago, Illinois*, 91 F.3d 981, 993-994 (7th Cir. 1996) ("removal is proper only if the action originally could have been brought in the district court"), *rev'd on other grounds*, 118 S.Ct. 523 (1997); *Frances J.*, 19 F.3d at 341 ("[I]f even one claim in an action is jurisdictionally barred from the federal court by a state's sovereign immunity, . . . then as a consequence of § 1447(a), the whole action cannot be removed to federal court."), *cert. denied*, 513 U.S. 876 (1994); *Smith v. Wisconsin Department of Agriculture, Trade and Consumer Protection*, 23 F.3d 1134, 1139 (7th Cir. 1994) ("[T]he Supreme Court has squarely rejected the argument that there is an implicit 'futility exception' hidden behind the plain meaning of § 1447(c)"). The Second Circuit also has recognized that such an exception probably does not exist in light of the decision in *International Primate*. *Barbara v. New York Stock Exchange*, 99 F.3d 49, 56 n.4 (2nd Cir. 1996).

Two cases dealing with this issue were decided prior to *International Primate* in a manner consistent with *International Primate* – one from the Fifth Circuit and one from the First Circuit. In *McKay v. Boyd Construction Co., Inc.*, 769 F.2d 1084 (5th Cir. 1985), the court held that the Eleventh Amendment precluded the federal district court from exercising removal jurisdiction over a state agency and, therefore, that remand of the claim against the state agency also required remand of the claim against the private contractor since they were allegedly jointly liable. In the second case, explicitly noted in *International Primate*, the First Circuit expressly refused to adopt the futility exception, stating that "the fact that we believe a certain legal result *unlikely*, as a matter of state law, is not

sufficient grounds for reading an exception into the absolute statutory words 'shall be remanded'." *Maine Association of Interdependent Neighborhoods*, 876 F.2d at 1055 (emphasis in the original).

Only the Ninth Circuit has recognized a "futility exception" since this Court's decision in *International Primate*. In *Kruse v. State of Hawai'i*, 68 F.3d 331, 334 (9th Cir. 1995), the court held that removed § 1983 claims to which the Eleventh Amendment immunity might apply should be dismissed, rather than remanded to state court, because the state is not a "person" under § 1983.

Kruse, in rejecting the logic of the Seventh Circuit in *Frances J.*, adopted what it called "the better-reasoned approach of the Sixth Circuit" in *Henry v. Metropolitan Sewer District*, 922 F.2d 332 (6th Cir. 1990). *See* 68 F.3d at 334-335. However, the decision in *Henry* also predated this Court's decision in *International Primate*. Remarkably, the *Kruse* decision does not even mention *International Primate*, which was decided more than four years before *Kruse*. *Kruse* was wrongly decided.

All of the courts to look at the issue post *International Primate*, except the Ninth Circuit, agree with the position of the respondent in this case. Because *Kruse* did not attempt to construe the applicable language of the removal statutes, did not mention *International Primate*, and based its decision on a decision from the Sixth Circuit which pre-dated *International Primate*, it should be viewed as an anomaly, particularly in light of the literal language of the removal statutes, the clear effect of the Eleventh Amendment, and the controlling principle that

courts lack the power to render advisory opinions without subject matter jurisdiction. In short, there is no legal basis for carving out a "futility exception" to § 1447(c), and doing so would raise serious Article III concerns.

B. It Would Be Both Improper And Unwise For Federal Courts To Speculate About The Alleged Futility Of A Remand As Petitioners Suggest In This Case.

The flaw in petitioners' argument and the approach taken by the Ninth Circuit in *Kruse* is related to the reason the Court declined "to speculate on the proper result" in *International Primate*. *Cf. International Primate*, 500 U.S. at 89. That is, the Court lacked subject matter jurisdiction, which was necessary as a predicate for undertaking the inquiry into the alleged futility. As the Seventh Circuit has said, "[T]he point of § 1447(c) is that a federal court does not have the authority to dismiss a claim over which it never had jurisdiction in the first instance. The merits of the state law claim are therefore irrelevant to this determination." *Smith*, 23 F.3d at 1339 n.10. That conclusion reflects the fact that " '[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . ' " *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (*quoting Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981)). *See also Steel Company*, 118 S.Ct. at 1012.

This Court and the federal courts generally make reference to "the literal words of § 1447(c)" and specifically to the phrase "shall be remanded." *See, e.g., International Primate*, 500 U.S. at 89. In addressing the specific

argument of petitioners and the aberrant approach of the Ninth Circuit in *Kruse*, however, respondent focuses upon other words in the sentence, "If at any time before final judgment *it appears that* the district court lacks subject matter jurisdiction, *the case* shall be remanded." (emphasis added). The literal words of § 1447(c) on their face support the interpretation that there is no futility exception. First, § 1447(c) states that the case shall be remanded if *it appears that* the district court lacks subject matter jurisdiction, implying that the case shall be remanded if the problem of subject matter jurisdiction appears to exist – not that there shall be a detailed inquiry into the matter by the federal court before remand occurs. Secondly, § 1447(c) provides that, when it appears that the district court lacks subject matter jurisdiction, *the case* shall be remanded, implying that the entire action shall be remanded – not specific claims or other subparts of "the case." Indeed, one need not look further than the literal words of 28 U.S.C. § 1447(c) to see that the decision of the Seventh Circuit in this case should be affirmed.

Even if there were a "futility exception" to § 1447(c), a remand would not be futile in this case. Even if speculation were proper, petitioners' speculation that remand would be a nullity is not correct. Certainly, upon remand the state court could determine that Schacht has viable claims for the denial of liberty and property without procedural due process and substantive due process of law, which claims should go to trial to a jury, as urged by respondent in the pending appeal before the Seventh Circuit.

Upon remand, respondent has a right to file an amended or supplemental pleading, as provided in § 802.09, Wis. Stats. Respondent could amend his pleadings to state a claim for damages, reinstatement and backpay for denial of liberty and property in violation of his right to due process of law under the Wisconsin Constitution. Wis. Const. Art. I, § 1. Although it may be anticipated petitioners would object on the grounds that respondent has not complied with the notice of claim statute, § 893.82, Wis. Stats., the fact that he did not file a notice of claim is not a bar to an action for a tort committed by a state agency and state officials in violation of the state constitution. *See, e.g., Zinn v. State*, 112 Wis. 2d 417, 334 N.W.2d 67 (1983) (Doctrine of sovereign immunity cannot bar an action for just compensation based on the taking of private property for public use even though the legislature failed to establish specific provisions for recovery of just compensation.). Whether the respondent would prevail in such an effort may be unknown, but the point remains that remand in this case is not futile.

Speculation by the federal courts as to what may happen in the state courts is also unwise because decisions of the federal courts interpreting or applying state law are not *stare decisis* and need not be followed by state courts. *Freeman v. Lane*, 962 F.2d 1252 (7th Cir. 1992); *see also, United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) ("[B]ecause lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.") Therefore, it would not be prudent for this Court to encourage federal district courts to get into the

business of unnecessarily interpreting state law or predicting what effect their remand orders may have after implementing the mandate of § 1447(c). The only thing that is certain upon remand in this case is that the state court has jurisdiction to proceed on respondent's claims against the petitioners named in their individual capacities as defendants. *Hafer; cf. Will.*

III. PETITIONERS' INTERPRETATION OF THE REMAND STATUTES IS CONTRARY TO FUNDAMENTALS OF STATUTORY CONSTRUCTION, THE INTENT OF CONGRESS, AND SOUND PUBLIC POLICY.

The argument by petitioners, which is essentially that the Court should engage in modification or interpretation of the literal words of § 1447(c), is contrary to basic principles of statutory construction. Recently, the Court said:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent."

Robinson v. Shell Oil Company, 117 S.Ct. 843, 846 (1997), *quoting United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989). That "there is no need to refer to the legislative history where the statutory language is clear"

is a "canon of construction [which] has received consistent adherence in [this Court's] decisions." *Ex parte Collett*, 337 U.S. 55, 61 (1949). In *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992) the Court said:

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

503 U.S. at 253-254, *quoting Rubin v. United States*, 449 U.S. 424, 430 (1981) *and citing Ron Pair Enterprises*, 489 U.S. at 241-242, *United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897), *and Oneale v. Thornton*, 6 Cranch 53, 68, 3 L.Ed. 150 (1810).

Nonetheless, the legislative history of the removal statutes demonstrates that it was the intent of Congress that the Court should adhere to the literal words of § 1447(c) and remand the entire action, not just individual claims, to state court when federal subject matter jurisdiction is lacking. That conclusion follows from the fact that the legislative history strongly supports the conclusion of the Seventh Circuit that only cases that are wholly within federal jurisdiction are removable under 28 U.S.C. § 1441(a).

The Judiciary Act of 1789 precluded removal of parts of cases. Hartnett, 63 Fordham L. Rev., *supra*, at 1113-15. A short-lived Congressional experiment with permitting removal of parts of cases between 1866 and 1875 was ended because "much confusion and embarrassment, as well as increase in the cost of litigation" resulted. *Id.* at 1115-21. When federal courts nevertheless occasionally

permitted removal of parts of cases, *id.* at 1121-29, the resulting confusion led Congress to again repudiate the notion of piecemeal removal in the Revised Judicial Code of 1948. *Id.* at 1132. Finally, the 1990 amendment to 28 U.S.C. § 1441(c) was based on the Congressional assumption that § 1441(a) only authorizes removal if the entire case is within federal jurisdiction and that piecemeal removal is not permitted. *Id.* at 1148. "Thus, just as it had done in 1875 and 1848, Congress in 1990 again repudiated piecemeal removal." *Id.*

The Court can avoid repeating the errors of the past by affirming the Seventh Circuit to ensure that we do not go back down old roads again. It would be a shame to have to yet again endure the confusion and increased litigation costs of the piecemeal removal implicitly advocated by petitioners' arguments to the Court. To do so would only force Congress – once again – to call a halt. The burden should be upon petitioners to convince Congress, not this Court, that §§ 1441(a) and 1447(c) should be altered to suit their position. The history of those statutes is consistent with their unambiguous language, and the Court now has the opportunity to make it unmistakably clear that there is no "futility exception" to the remand mandate of § 1447(c).

Petitioners' unpersuasive policy arguments, in their brief at 31-36, can be summarized by their conclusion: "This is no way to run a judicial system." Petitioners' brief at 34. Policy considerations cannot outweigh the plain meaning of an unambiguous statute. *Robinson*, 117 S.Ct. at 846; *Connecticut National Bank*, 503 U.S. at 254.

Likewise, policy considerations should not be determinative in Eleventh Amendment jurisprudence where a court lacks subject matter jurisdiction.

Moreover, policy considerations actually favor the position espoused by respondent in this case. As the Seventh Circuit noted in *Frances J.*, "preventing a defendant from splitting a single case into two, one state and the other federal, furthers judicial economy." 19 F.3d at 341. *See also supra* at 19 n.5; Section I.B. *supra* at 27.

Federal courts are burdened enough now with § 1983 actions, and it would be good policy to have the state courts shoulder their fair share of the burden. They are competent courts of original jurisdiction. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *Claflin v. Houseman*, 93 U.S. 130, 136 (1876). Certainly, the state courts of Wisconsin are prepared to accept their responsibility to do so. *See, e.g., Vogt v. Nelson*, 69 Wis. 2d 125, 230 N.W.2d 123 (1975) ("State courts are bound to entertain actions to enforce liabilities created by federal law unless prohibited by an act of Congress.").

Thus, sound public policy, legislative history evincing the intent of Congress, and canons of statutory construction line up in the parade of reasons why in this case the district court lacked subject matter jurisdiction and the action should be remanded to state court. The great weight of the arguments falls on the side of the respondent in this case and the conclusion that the Seventh Circuit decision was correct.

CONCLUSION

For the foregoing reasons the decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

DAVID E. LASKER, ESQ.
Counsel of Record
LASKER LAW OFFICES, S.C.

Attorneys for Respondent
Tenney Plaza – Suite 800
3 South Pinckney Street
Madison, Wisconsin 53703
Telephone: (608) 255-8400
Facsimile: (608) 255-8410

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No. 97-461

In The

Supreme Court of the United States

October Term, 1997

WISCONSIN DEPARTMENT OF CORRECTIONS, *et al.*

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS ON THE MERITS

JAMES E. DOYLE
Attorney General
RICHARD BRILES MORIARTY*
Assistant Attorney General
Wisconsin Department of Justice
123 West Washington Avenue
Madison, Wisconsin 53707
Telephone: (608) 267-2796
Counsel for Petitioners

*Counsel of Record

QUESTION PRESENTED

Where a plaintiff never objects to removing a civil action asserting only federal claims under 42 U.S.C. § 1983, must an appellate court, on its own motion, vacate judgment for defendants, and remand the entire action to State court, simply because the plaintiff included claims which any court would have dismissed?

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS ON THE MERITS

SUMMARY OF THE ARGUMENT

Petitioners articulated many reasons for reversing the Seventh Circuit decision: (1) The individual capacity claims, presenting substantial federal questions, sufficiently invoked removal jurisdiction. (2) Eleventh Amendment analysis was unnecessary since States are not "persons" subject to Section 1983 liability. (3) Eleventh Amendment immunity, as a defense for States to use and control, can not diminish federal question jurisdiction over

an action. (4) Remand to the State court, beyond being legally indefensible, served no practical purpose since the claims against the State would be barred in any court. (5) Constitutional and statutory guarantees, and effective judicial administration, would be seriously disrupted if the Seventh Circuit decision stands.

Schacht, in contesting these reasons for reversal, not only confirmed the validity of each one, but provided a concrete example of the adverse impacts which the decision below will have on States and any defendant sued with States. If this action is remanded to Wisconsin courts, he will use his unexpected salvation from near certain defeat on the claims he pursued in the federal courts to instead try to pursue new and different claims against petitioners. The Seventh Circuit decision should be reversed.

ARGUMENT

In a removed action asserting only federal claims under 42 U.S.C. § 1983, an appellate court should not, based on the plaintiff having included claims against a State, vacate judgment for petitioners, and remand the entire action to State court.

I. Removal jurisdiction exists if the district court has federal question jurisdiction over just one claim.

When an action is filed in district court based on federal question jurisdiction, the jurisdictional standards are the same whether it arrives through removal or is initiated in district court. *E.g.*, City of Chicago v. International College of Surgeons, 118 S.Ct. 523, 529 (1997). Just one substantial federal question gives the district court jurisdiction over the action. *E.g.*, City of Chicago, 118 S.Ct. at 530 (removal jurisdiction); Romero v. International Term. Operat. Co., 358 U.S. 354, 359, *reh. denied*, 359 U.S. 962 (1959) (original jurisdiction); Steel Co. v. Citizens for a Better Environment, 118 S.Ct. 1003, 1010 (1998) (original jurisdiction). Schacht's individual capacity claims, standing alone, presented sufficient substantial federal questions to satisfy this criterion. *E.g.*, Moor v. County of Alameda, 411 U.S. 693, 712 (1973).[1]

In determining federal question jurisdiction over an action, it is irrelevant whether a State is, or is not, a party (*e.g.*, Ames v. Kansas, 111 U.S. 449, 463, 470-72 (1884)) or whether Eleventh Amendment immunity may be asserted (*e.g.*, Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 117 (1984)). *See also* Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 841-42 (1989). Each effort by Schacht to create an Eleventh Amendment exception to these general jurisdictional principles runs aground on the decisions of this Court.

The Seventh Circuit, in the decision below and other decisions, held that a district court which cannot adjudicate every claim in a removed action must, despite substantial federal questions, remand the action. (*See* Petitioners brief, p. 11; J.A. 37-40.) Those holdings were overruled in City of Chicago, 118 S.Ct. at 530 (state law claims, over which federal courts lacked original jurisdiction, did not defeat removal since the "federal claims suffice to make the actions 'civil actions' within the 'original jurisdiction' of the

[1]Removal can be questioned here only on jurisdictional grounds. While Schacht asserts that, had summary judgment been reversed on appeal, he could have, on district court remand, raised unspecified procedural challenges to removal (Schacht brief, 18-19, text and n. 5), he also admits, as he must, that he waived that right shortly after removal. (Schacht brief, pp. 18-19 quoting Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702 (1972).) *See* 28 U.S.C. § 1447(c)).

district courts for purposes of removal. § 1441(a).") *See also* Romero, 358 U.S. at 359.

When Schacht takes up City of Chicago, he tries to cast it aside with a dismissive notation that it "did not involve a state defendant or the Eleventh Amendment." (Schacht brief, pp. 21-22.) Ames clarified, however, that federal question removal jurisdiction is wholly unaffected by whether a State is a party. 111 U.S. at 463, 470-72. Ames should be ignored, Schacht argues, because the State in that removed action was a plaintiff, not a defendant. (Schacht brief, p. 22.) Ames refrained from articulating its holdings that narrowly. 111 U.S. at 463 ("The [removal] statute itself makes no exception of suits to which a state is a **party**" (emphasis added)).

After reviewing the development of removal and original jurisdiction (111 U.S. at 463-70), Ames, in 1884, precluded the position which Schacht now invokes:

> . . . The only question we have to consider is, therefore, whether suits cognizable in the courts of the United States on account of the nature of the controversy, . . . may now be brought in or removed to the [federal] courts **without regard to the character of the parties**. All admit that the [removal] act does give the requisite jurisdiction in suits where a state is not a party, so that **the real question is whether the constitution exempts the states from its operation**.
>
> . . . After bestowing on this subject the most attentive consideration, the court can perceive no reason, founded on the character of the parties, for introducing an exception which the constitution has not made; and we think the judicial power, as originally given, extends to all cases arising under a constitution or a law of the United States, **whoever may be the parties**.

Ames, 111 U.S. at 470-71, bracketing, ellipses and emphasis added. A State being among the defendants removing to district court based on federal questions should not alter the threshold jurisdictional inquiry. *Cf.* Glosemeyer v. Missouri-Kansas-Texas R.R., 879 F.2d 316, 318, 320-21 (8th Cir. 1989), *cert. denied*, 494 U.S. 1003; C & C Plywood Corp., 420 F.Supp. 1254, 1257-59 (D.Mont. 1976), *aff'd* 583 F.2d 421 (9th Cir. 1978).

Nonetheless, Schacht resists the Ames holdings by arguing that:

> Naturally, the character of the parties is relevant, because the defendants are the parties who seek removal. Removal rights are granted to all defendants - except that special and unusual class of defendants who have Eleventh Amendment immunity and seek removal without being willing to waive it.

(Schacht brief, pp. 22-23.) Schacht fails to support these propositions with any cited authority (S.Ct.R. 24.1(i) and 24.2).[2] Given Ames, there is none. Applicable authority instead points away from any conclusion that a State's invocation of federal question jurisdiction is ever contingent on the State waiving its sovereign immunity.

---

[2]This failure is ironic. Schacht criticizes defendants on five occasions because statements in their brief, which introduced no new propositions and merely summarized adjacent propositions supported by citations, were not followed by repetition of those citations. (*Compare* Schacht brief, p. 23 *with* Defendants brief, pp. 10-14; *also compare* Schacht brief, pp. 24-25, text and n.11 *with* Defendants' brief, pp. 21-25.)

When Pennhurst, in which a State was sued, began "to consider the relationship between pendent jurisdiction and the Eleventh Amendment," its first step was to confirm the application of the general rule that "when a federal court obtains jurisdiction over a federal claim, it may adjudicate other related claims over which the court otherwise would not have jurisdiction. [Citations omitted.]" 489 U.S. at 117. Since that general rule was reiterated in a case Schacht uses because it involved a State and Eleventh Amendment immunity, he may not avoid the general rule by merely noting that the authority cited by petitioners, Romero, did not involve a State. (Schacht brief, pp. 9 (citing Pennhurst) and 22 (discussing Romero)).

Whether an action is removed to district court or initiated there, the presence of sovereign immunity as a defense is simply irrelevant to a threshold inquiry into federal question jurisdiction over the action. *E.g.*, Oklahoma Tax Comm'n, 489 U.S. at 841-42 (a tribe does not, by asserting sovereign immunity, create federal question jurisdiction justifying removal since sovereign immunity is a defense that does not enter into that threshold jurisdictional inquiry).

No party entitled to sovereign immunity, when invoking the original jurisdiction of a district court, is required to leave that entitlement outside the courthouse door. Massachusetts sued the United States in district court for the express purpose of asserting its sovereign immunity as a bar to certain federal taxes. Massachusetts v. United States, 435 U.S. 444, 452-53 (1978). That immunity claim was resolved on its merits with no hint that entry to the federal courts required its abandonment. 435 U.S. at 443-70. *See also* Ohio v. Helvering, 292 U.S. 360, 366-71 (1934) (Ohio sought "leave to file a bill of complaint invoking the original jurisdiction of this court" to enjoin the United States, based on Ohio's sovereign immunity, from collecting certain taxes).

To the contrary, a party may invoke the jurisdiction of a court while retaining the right to also invoke sovereign immunity as a defense to claims made against the party. *E.g.*, United States v. Shaw, 309 U.S. 495, 497-98 (1940) (United States did not, by affirmatively filing a claim in Michigan probate court, expand waiver of sovereign immunity against a cross-claim beyond congressionally designated boundaries); Sloan Shipyards Corp. v. United States Shipping Bd., 258 U.S. 549, 568-69 (1922) (Board asserting sovereign immunity properly invoked federal question removal jurisdiction but did not prove entitlement to immunity); United States v. $277,000 U.S. Currency, 69 F.3d 1491, 1493 (9th Cir. 1995) (sovereign immunity not waived against counter claim because United States, rather than the claimant, initiated federal court proceedings); United States v. Patterson, 206 F.2d 345, 348, text and n. 7 (5th Cir. 1953) ("it is now well settled that the United States does not waive its sovereign immunity by the institution of an action and does not become subject to an affirmative judgment, at least as to a counterclaim which could not have been asserted against it in an original action") and cases cited; United States v. Finn, 239 F.2d 679, 682, text and n. 18 (9th Cir. 1956) (citing five prior Supreme Court decisions as confirming that "[a]s regards [the United States' immunity as plaintiff] from suits to which Congress has not given plaintiff's consent, and as regards jurisdiction of such suits, there is no distinction between counterclaims and original suits").

Sovereign immunity is a defense. *E.g.*, Collins v. Youngblood, 497 U.S. 37, 41 (1990) ("Eleventh Amendment defense"); Fitzpatrick v. Bitzer, 427 U.S. 445, 453 (1976) ("Eleventh Amendment defense"). Removal jurisdiction is generally determined on claims made by plaintiffs, not on potential defenses. *E.g.*, Rivet v. Regions Bank of Louisiana, 118 S.Ct. 921, 925 (1998). This is as true of the sovereign immunity defense as any other defense. *E.g.*, Oklahoma Tax Comm'n, 489 U.S. at 841-42. While sovereign immunity is, to be sure, a defense which

commands constitutional attention (*e.g.*, Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1124-28, 1131-32 (1996)), it remains a defense (*e.g.*, Collins, 497 U.S. at 41; Fitzpatrick, 427 U.S. at 453).

There is no Eleventh Amendment exception to the general rule that federal question removal jurisdiction is properly invoked if one substantial federal question is present. *E.g.*, City of Chicago, 118 S.Ct. at 530; Ames, 111 U.S. at 470-71; Pennhurst, 489 U.S. at 117; Oklahoma Tax Comm'n, 489 U.S. at 841-42. Schacht nowhere questions that his individual capacity claims presented substantial federal questions (Petitioners brief, p. 10) and, in fact, admits that only "federal legal issues" were presented in this action. (Schacht brief, p. 21.) As a last attempt to avoid the Court holdings that one substantial federal question creates jurisdiction over an entire action, he asserts that they contradict its other holdings that all defendants must join in removing a single controversy. (Schacht brief, p. 20, text and n.7.) These Court holdings are consistent. They all serve the purpose of keeping court actions whole and avoiding concurrent conflicting actions. (*See* Defendants brief, 10-11.) The general rule controls.

The Seventh Circuit erred in not ending its jurisdictional inquiry by simply noting that substantial federal questions were presented at time of removal. This was the first of many errors.

II. Section 1983 claims against a State need never be dismissed on Eleventh Amendment immunity grounds since a State is not a "person" under Section 1983.

Schacht cites Steel Co. to refute petitioners' position that, because States are not "persons" under Section 1983, the Eleventh Amendment bar to Section 1983 claims

against States did not need to be considered. (Schacht brief, p. 13.) Not only does Schacht ignore a critical authority underlying petitioners' position, Ngiraingas v. Sanchez, 495 U.S. 182 (1990), but Steel Co. actually emphasizes that petitioners are correct.

Steel Co. held that a federal court must, when its jurisdiction over an action is in doubt, proceed directly to that question and that, if jurisdiction over the action is lacking, the only alternative is dismissal. 118 S.Ct. at 1012, citing Ex parte McCardle, 1 Wall. 506, 514, 74 U.S. 506 (1868) and other Court decisions. Steel Co. confirms that Eleventh Amendment immunity does **not** deprive a district court of jurisdiction over an action. 118 S.Ct. at 1010. Otherwise, the Court would never defer looming Eleventh Amendment issues by instead searching for other grounds to dismiss claims which give rise to those issues. *E.g.*, Ngiraingas, 495 U.S. at 185, n.2 and 192, n.12 (analyzed in Petitioners brief, pp. 18-19); Mt. Healthy City Bd. v. Doyle, 429 U.S. 274, 276-82 (1977) (first analyzing contention that the Board was not a "person" under Section 1983 and, finding that contention waived, only then addressing Eleventh Amendment issues); *See also* Patsy v. Board of Regents, 457 U.S. 496, 516, n. 19 (1982) (ruling on merits despite presence of potential Eleventh Amendment bar). *See also* Welch v. Texas Dep't of Highways and Public Transportation, 483 U.S. 468, 492-93 (1987) (plurality) noting that the Court, in past decisions, "avoided" troubling Eleventh Amendment issues.

Schacht contends that petitioners read too much into footnote 19 in Patsy and that the words the majority chose to use there were undercut by its citation to Mt. Healthy. (Schacht brief, pp. 17-18.) If anything, petitioners may have understated the meaning of the footnote. *See* Patsy v. Board of Regents, 457 U.S. 519, 520-32 (1982) (Powell, J., and Burger, C.J., dissenting). *See esp. id.* at 524-25, text and n. 9 and 531-32 (criticizing the holdings in this footnote at length). Although the

dissent questioned if there was a link missing between the Eleventh Amendment holdings in this footnote and its Mt. Healthy citation (Patsy, 457 U.S. at 524, text and n.9 (Powell, J., and Burger, C.J., dissenting), the majority retained this citation (Patsy, 457 U.S. at 516, n. 19). After all, Mt. Healthy had, as in Patsy, **analyzed** a nonjurisdictional issue first and diverged from Patsy because, finding the nonjurisdictional issue waived, it ultimately had to reach the immunity issue. 429 U.S. 274, 276-82. Petitioners' reading of this footnote is consistent with its citation to Mt. Healthy. The point, Steel Co. confirms, is what any federal court is compelled to do first in each action (118 S.Ct. at 1012), not if it ultimately resolves any immunity issues.

If Eleventh Amendment immunity, whenever it bars a claim, was a jurisdictional black hole which drains federal district courts of all power over an action, Patsy would not have deferred immunity issues, citing the perceived wishes of the State defendant, to instead address a merits issue. 457 U.S. at 516, n. 19. *See also* Patsy v. Board of Regents, 457 U.S. 517, 519, n. (1982) (White, J., concurring) (stating no objection to "leaving the Eleventh Amendment issue for further consideration by the lower courts" absent some logical priority for resolving Eleventh Amendment immunity before the nonjurisdictional issue of exhaustion of remedies). Patsy ruled as it did precisely because Eleventh Amendment immunity does **not** render a federal court "altogether disqualified from hearing certain suits brought against a State." Idaho v. Couer d'Alene Tribe of Idaho, 117 S.Ct. 2028, 2033 (1997).

Schacht, like the Seventh Circuit, missed the point made in Arizonans for Official English v. Arizona, 117 S.Ct. 1055, 1069-70 (1997) that the definition of "persons" in Section 1983 should be addressed before looking at any effect Eleventh Amendment immunity may have on Section 1983 claims. Arizonans did not, as Schacht contends, conduct an inquiry into whether Eleventh Amendment

immunity was waived. (Schacht brief, pp. 12, 15-16.) Instead, citing Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989), it implied the appellate court in Arizonans was wrong for the same reason Will had implied Della Grotta v. State of R.I., 781 F.2d 343 (1st Cir. 1986) was wrong: for **examining** whether a State had waived Eleventh Amendment immunity against a Section 1983 claim when that constitutional analysis was avoidable because States are not "persons" under Section 1983. Arizonans, 117 S.Ct. at 1069-70; Will, 491 U.S. at 61, n.3. *See* Petitioners brief, pp. 15-19.

"'Jurisdiction . . . is a word of many, too many, meanings.' [citation omitted]." Steel Co., 118 S.Ct. at 1010. While a jurisdictional issue, Eleventh Amendment immunity plainly does not deprive a district court of original jurisdiction over an action. Instead a district court may well have constitutional authority to hear an action, and even determine it has jurisdiction over a particular claim pled in that action, but be barred by the Eleventh Amendment from awarding relief as to that claim. *E.g.*, Pennhurst, 465 U.S. at 120-21 citing Edelman v. Jordan, 415 U.S. 651, 653, n.1 and 678 (1974). The Seventh Circuit, if concerned about the claims against the State, should have looked first to the definition of "person" under Section 1983 and, recognizing those claims were baseless as a nonjurisdictional matter, returned to the merits of the appeal. Regardless, Eleventh Amendment immunity is for the States, not federal courts, to use and control.

III. Eleventh Amendment immunity defenses are for States to use and control and can never defeat removal jurisdiction.

According to Schacht, federal courts must, whenever a State is sued, determine, at the outset, whether Eleventh Amendment immunity is a potential bar to any claim and,

if so, dismiss the entire action for lack of subject matter jurisdiction. He cites numerous decisions as evidence that, whenever claims are made against a State, a federal district court must, on its own, immediately address the possibility that Eleventh Amendment immunity could be asserted and then either entirely exclude it as a potential bar or refuse to exercise jurisdiction over the action. (Schacht brief, pp. 8-11, 14, 17-18 and cases cited.)

It suffices to observe that Schacht located no Court decision in which the federal courts, rather than parties potentially protected by Eleventh Amendment immunity, raised the issue. To the contrary, in every decision cited to support his position, Eleventh Amendment immunity was raised by the defendants and **not** by the federal courts. Pennhurst, 465 U.S. at 95-96 (the appellate court "rejected [the State's] argument that the Eleventh Amendment barred a federal court from considering a pendent state-law claim"); Quern v. Jordan, 440 U.S. 332, 333 (1979) (a "sequel" to Edelman where the State asserted Eleventh Amendment immunity (415 U.S. at 658-59)); Alabama v. Pugh, 438 U.S. 781, 782 (1978) (*per curiam*) (Eleventh Amendment immunity asserted by defendants); Hutto v. Finley, 437 U.S. 678, 689 (1978) ("The Attorney General . . . contends that any award of fees is prohibited by the Eleventh Amendment"); Fitzpatrick, 427 U.S. at 453 ("the Eleventh Amendment defense is asserted"); Edelman, 415 U.S. at 658-59 (the State "contended . . . that the Eleventh Amendment barred the award of retroactive benefits"); Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459, 466-67 (1945) (after defending on the merits, the State raised and argued Eleventh Amendment immunity "in this Court"); State of Missouri v. Fiske, 290 U.S. 18, 21-22 (1933) ("The state appeared specially and moved to dismiss [in part because] it was a suit against the state, which had not consented to be sued, in violation of the Eleventh Amendment"); In re State of New York, 256 U.S. 490, 496 (1921) (the State sought dismissal because "they were suits against the state

of New York in which the state had not consented to be sued" and pursued prohibition and mandamus after request denied); Hans v. Louisiana, 134 U.S. 1, 3 (1890) (the State asserted to lower court that "'Plaintiff cannot sue the state without its permission; the constitution and laws do not give this honorable court jurisdiction of a suit against the state"); Welch, 483 U.S. at 471 (citing district court decision, 533 F.Supp. 403, 404 (S.D.Tex. 1982) which noted the State moved for Eleventh Amendment dismissal); Puerto Rico Authority v. Metcalf & Eddy, 506 U.S. 139, 141 (1993) (defendant had sought dismissal, based on Eleventh Amendment immunity, in district court); Mt. Healthy, 429 U.S. at 276-81 ("consider[ing] an admixture of jurisdictional and constitutional claims" by the Board (429 U.S. at 276), of which the third was "whether the Board was entitled to immunity from suit in the federal courts under the Eleventh Amendment" (429 U.S at 279-81)).

The Court may safely assume that this failure to cite a genuinely supportive citation was not due to faulty research. The Patsy dissent, in arguing against the majority view that Eleventh Amendment immunity is for States rather than courts to pursue, faced a similar challenge of showing that federal courts had, without any defendant having raised Eleventh Amendment immunity, used it as a jurisdictional bar. Patsy, 457 U.S. at 524, text and n.9 (Powell, J., and Burger, C.J., dissenting). The closest it came was Sosna v. Iowa, 419 U.S. 393 (1975) in which, in the words of the Patsy dissent, "the Court raised the question of the Eleventh Amendment even though the State **had** asserted the bar of the Amendment only in its answer to the complaint and had thereafter abandoned the **defense** in this Court." 457 U.S. at 524, text an n.9 (Powell, J., and Burger, C,J., dissenting), emphasis added.

Locating just one decision would not have turned the tide. Schacht's position fails, under Steel Co., unless the Court had, every time a claim was made against a State, examined Eleventh Amendment immunity, whether

raised or not, as a threshold jurisdictional matter. His own citations, and the Patsy dissent, demonstrate that his position is far afield from this Court's decisional law.

Eleventh Amendment immunity is a "prerogative" of the States (Hopkins v. Clemson Agricultural College, 221 U.S. 636, 642-43 (1911)). Schacht admits that it is a "card" for States "to use." (Schacht brief, p. 8.) The Seventh Circuit erred by deeming Eleventh Amendment immunity a deathknell to removal. Its accumulated errors, beyond being contrary to the Court's decisions and the removal statutes, served no practical purpose. Section 1983 claims against a State are nonstarters in any court.

IV. The claims against the State, properly dismissed in federal district court, would also have been dismissed in State court.

A. Section 1983 claims against States will be dismissed in federal or State court.

Schacht admits that his claims against the State were defective because States are not "persons" under Section 1983. (Schacht brief, pp. 12-13 and 15 (quoting Will).) He apparently admits, as did the Seventh Circuit (J.A. 39), that this defect barred those claims in any court. (Schacht brief, pp. 14-15 (quoting Will) and 27 (asking why dismissal was not sought on this ground before removal.)

B. There was, and is, no need to determine if there is a futility exception to removal statutes.

Petitioners did not seek reversal based on any "futility exception" to removal jurisdiction. Though

petitioners could avoid State court remand if an exception exists, their position depends on the Court concluding that the district court had removal jurisdiction. (Petitioners brief, pp. 10-30.) If it concludes otherwise, petitioners expect to relitigate this action in the Wisconsin courts.

Schacht nonetheless consumes considerable brief space examining the options open to a district court which **lacks** removal jurisdiction. (Schacht brief, pp. 29-41.) Petitioners again suggest that the parties' discussion of a potential "futility exception" be used merely to recognize a split in the circuits and to leave that issue open for a more appropriate case. (*Compare* Petitioners brief, pp. 29-30 *with* Schacht brief, pp. 29-41.) The briefs confirm that the First Circuit requires remand where a meaningful State law result is only unlikely rather than futile, the Second Circuit declined to reach the issue, the Third, Fourth and Seventh Circuits have held that no futility exception exists and the Fifth, Sixth and Ninth Circuits have held a futility exception does exist. (*Compare* Petitioners brief, pp. 29-30 *with* Schacht brief, pp. 29-41.) The issue should await a case which sharply defines the conflicting reasons why a "futility exception" should, or should not, be recognized. This is not that case.

V. The decision below not only lacks any valid legal support and breaches vital constitutional and statutory guarantees but disrupts effective judicial administration.

States and any defendants sued with States are entitled to use the tools available to all litigants. Where federal questions are posed in a State court action, removal is among those tools. Schacht questions petitioners having used that tool here by speculating that they both had a "home court advantage" in Wisconsin courts **and** gained an "unfair advantage" by removing to federal court. (Schacht

brief, pp. 26 and 29.) It is far from a safe assumption that State defendants sued on federal law claims have an "advantage" in one court system as opposed to the other. *E.g.*, Will, 491 U.S. at 60-61 (State circuit court entered judgments against the State on the Section 1983 claims which Will later held invalid). Nonetheless, if his assertion that State defendants are generally treated more favorably in their own courts were true, it would suggest that State defendants choose to remove to federal court with even greater care and deliberation than other defendants.

His theories on why petitioners chose to remove are factually baseless and legally irrelevant. He creates reasons that petitioners removed this action, impugns those imagined reasons and asserts there was no "need" to remove. (Schacht brief, pp. 6-8, 16, n.3, 23-29.) Removal is an **option** and a party's strategic reasons for removal, even when known, provide no basis for challenging removal. 28 U.S.C. § 1447. Courts rarely test the propriety of a litigation decision on the mental processes of attorneys representing litigants. The reasons Schacht chose to assert claims clearly precluded by the language of Section 1983 would be intriguing to explore, but that is as irrelevant as the reasons petitioners chose to remove.

Regardless, any litigant facing federal law claims in State court actions, including State defendants, might hesitate to entrust resolution of those claims to State courts which only rarely address federal law issues rather than to federal judges with developed expertise who daily resolve federal law claims and, of particular importance to State defendants, specialized defenses such as qualified immunity. Neither the Seventh Circuit nor Schacht may burden the simple and efficient removal system created by Congress with criteria which Congress chose not to impose. (28 U.S.C. § 1447.)

Petitioners noted the general havoc which the Seventh Circuit decision would cause. (Petitioners brief,

pp. 31-36.) Schacht reveals that the havoc would begin in this action and be immediate and concrete. He would use a remand to the Wisconsin courts to assert new State law claims he first mentions here in this Court. (Schacht brief, pp. 16-17 and 40.) He seems to acknowledge, by searching for new claims rather than trusting to those he prosecuted in federal court, that the merits briefs filed with the Seventh Circuit and the record confirm the near certainty that petitioners will ultimately prevail on the merits even if this action starts over in the Wisconsin courts. (Petitioners' Seventh Circuit Merits Brief, pp. 4-27 (Statement of Facts), and D-Ap. 101-166 and 176-203 (R. 30, 31 and 32 (district court filings showing admissions by Schacht)).) All that is presently unknown in this particular action is whether the resources the petitioners must apply to achieve this ultimate result are minimal or considerable.

Petitioners can absorb the extra resources a remand to the Wisconsin courts would require. The delicate balance which is our federalist structure is in far greater jeopardy. "The Framers split the atom of sovereignty." U.S. Term Limits v. Thornton, 514 U.S. 838, 838 (1995) (Kennedy, J., concurring). Atoms, and sovereignties, which share space remain "split" only with constant vigilance and effort. The Constitution looks to this Court to monitor the balance created by the Framers and to assure the atom of sovereignty remains split. To deprive States, and those sued with States, of basic rights granted all defendants because States, as fellow sovereigns, are entitled to immunity defenses, would not just permanently alter the simple and efficient removal structure chosen by Congress but disregard the delicacy of the vital balance chosen by the Framers. U.S. Term Limits, 514 U.S. at 838 (Kennedy, J., concurring).

Responding to the concerns petitioners expressed about the broader effects of the Seventh Circuit decision, Schacht only confirmed the validity of those concerns.

CONCLUSION

Petitioners ask that the decision below be reversed.

Respectfully submitted,

JAMES E. DOYLE
Attorney General

RICHARD BRILES MORIARTY
Assistant Attorney General
State Bar No. 1017190

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796

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No. 97-461

IN THE

Supreme Court of the United States

OCTOBER TERM 1997

WISCONSIN DEPARTMENT OF CORRECTIONS, *et al.*,
Petitioners,

v.

KEITH D. SCHACHT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF 22 STATES IN SUPPORT OF PETITIONER

JEFFREY A. MODISETT
Attorney General of Indiana
JON LARAMORE,
Counsel of Record
GEOFFREY SLAUGHTER
ANTHONY SCOTT CHINN
Deputy Attorneys General

Indiana Government
Center South, Fifth Fl
402 W. Washington St
Indianapolis, IN 46204
(317) 232-6315

Additional Counsel listed inside front cover

16 pp

BILL PRYOR
Attorney General of Alabama
State House, 11 S. Union St.
Montgomery, Alabama 36130

GRANT WOODS
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85007-2926

ROBERT A. BUTTERWORTH
Attorney General of Florida
The Capitol PL-01
Tallahasee, Florida 32399-1050

MARGERY S. BRONSTER
Attorney General of Hawaii
425 Queen St.
Honolulu, Hawaii 96813

JAMES E. RYAN
Attorney General of Illinois
100 W. Randolph St., 12th Floor
Chicago, IL 60601

J. JOSEPH CURRAN, Jr.
Attorney General of Maryland
200 St. Paul Place
Baltimore, Maryland 21202

SCOTT HARSHBARGER
Attorney General of Massachusetts
One Ashburton Place
Boston, MA 02108-1698

FRANK J. KELLEY
Attorney General of Michigan
P.O. Box 30212
Lansing, Michigan 48909

MIKE MOORE
Attorney General of Mississippi
P.O. Box 220
Jackson, Mississippi 39205

JOSEPH P. MAZUREK
Attorney General of Montana
Justice Building, P.O. Box 201401
Helena, Montana 59620-1401

PHILIP T. McLAUGHLIN
Attorney General of New Hampshire
33 Capitol St.
Concord, New Hampshire 03301

FRANKIE SUE DEL PAPA
Attorney General of Nevada
100 N. Carson St.
Carson City, Nevada 89701-4717

DENNIS C. VACCO
Attorney General of New York
The Capitol
Albany, New York 12224

HEIDI HEITKAMP
Attorney General of North Dakota
600 E. Boulevard Ave.
Bismarck, North Dakota 58505-0040

BETTY D. MONTGOMERY
Attorney General of Ohio
30 E. Broad St., 17th Floor
Columbus, Ohio 43215

JOHN KNOX WALKUP
Attorney General and
Reporter of Tennessee
524 Fifth Ave. North
Nashville, Tennessee 37253-0485

Additional Counsel on Inside Back Cover

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BRIEF *AMICUS CURIAE* OF 22 STATES

STATEMENT OF INTEREST OF *AMICI*

The 22 *amici* States are interested in this case because it implicates their sovereignty and their right to employ a federal forum on an equal basis with other litigants. In the decision below, the Seventh Circuit used the Eleventh Amendment, which addresses States' separate sovereignty, to

rob States of the legitimate litigation tool of removal under 28 U.S.C. § 1441. By holding that States and State officials cannot remove to federal court a lawsuit that contains any claim barred by the Eleventh Amendment, the Seventh Circuit has perverted the Amendment's meaning by placing States in a position subordinate to all other litigants.

The States' sovereign interest is to retain the authority to use the federal courts in appropriate cases. The Seventh Circuit's decision undermines the States' authority in litigation by restricting their freedom to remove appropriate cases to federal court for the adjudication of federal claims.

States and State officials may remove for a variety of reasons. First, States may choose a federal court because of its expertise in a particular area of law such as federal civil rights law, antitrust, Medicaid, or other substantive areas involving complex federal statutory schemes. Second, States may choose federal courts to obtain particular procedural protections not available in State forums. For example, after *Johnson v. Frankel*, 117 S. Ct. 108 (1997), States may select a federal forum because it assures State actors of interlocutory review of the denial of qualified immunity, a benefit not conveyed by all State systems. Third, States also may select a federal forum for reasons of simple convenience.

But the Seventh Circuit's decision deprives States of their sovereign power to choose the forum in which a federal claim is to be heard, a choice that all other litigants possess. Instead, the Seventh Circuit has placed exclusive control of forum selection in the hands of plaintiffs suing States or State entities. A plaintiff who is a clever pleader can defeat removal under the Seventh Circuit's approach by including any Eleventh-Amendment-barred claim in its complaint.

The *amici* States ask this Court to hold that States may remove an action under section 1441 even when the action contains a claim barred by the Eleventh Amendment. That ruling would show proper respect both for the interests guarded by the Eleventh Amendment and the interests protected by the removal statute. In this brief, the States argue that the removal statute's plain language permits removal even when one or more claims would be barred by the Eleventh Amendment.

SUMMARY OF ARGUMENT

The plain words of the removal statute establish that actions such as this one — containing some claims falling within federal question jurisdiction and others outside the original jurisdiction of federal courts — are removable. The claims within federal jurisdiction under 28 U.S.C. § 1331 and those that, standing alone, are outside federal jurisdiction constitute a single "civil action" removable under 28 U.S.C. § 1441(a). A case like Schacht's is removable because he could have filed the entire case in federal court in the first place, although some of the claims would have been dismissed or remanded.

The Court's recent decision in *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523 (1997), similarly interprets the phrase "civil action" to include non-federal claims when they are joined with federal claims. The Seventh Circuit made the same mistake in this case as in its now-reversed *College of Surgeons* opinion, ruling in both instances that a case could not be removed because it contained a single claim that was not within the original jurisdiction of the federal courts. Because both *College of*

Surgeons and *Schacht* contain claims within section 1331 jurisdiction, both cases are removable.

Other cases decided by this Court show that the Eleventh Amendment bars only particular claims against the State, not entire actions including such barred claims. To hold otherwise would permit the very forum-shopping that section 1441 was designed to prevent.

ARGUMENT

A district court's jurisdiction over a removed action is not defeated by the mere presence of a claim barred by the Eleventh Amendment.

I. The language of 28 U.S.C. § 1441 establishes that Eleventh-Amendment-barred claims do not defeat removal.

The Seventh Circuit erroneously remanded Respondents' entire action on the ground that it contained a state claim barred by the Eleventh Amendment. Under the plain words of 28 U.S.C. § 1441, removal of the entire action should have been permitted because the entire action could have been brought originally in federal court under 28 U.S.C. § 1331. Once the action was removed, any claims not properly before the federal court should have been treated just as if the case had been brought originally in federal court: they should be dismissed or remanded to State court as appropriate.

The statute permits removal of "any civil action . . . of which the district courts . . . have original jurisdiction." 28 U.S.C. § 1441(a). In this case, all of Schacht's claims could have been brought initially in federal court in a single action under 28 U.S.C. § 1331, so the entire case was removable. If

Schacht had filed initially in federal court, his claims for money damages against the State, State agencies, and State employees sued in their official capacities would have been barred by the Eleventh Amendment and, therefore, remanded or dismissed subject to re-filing in State court. *See Kruse v. Hawaii*, 68 F.3d 331, 334 (9th Cir. 1995) (dismissing Eleventh-Amendment-barred claims and remanding other claims after removal, relying on *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 120-21 (1984)).

City of Chicago v. International College of Surgeons, 118 S. Ct. 523 (1997), confirms that cases may be removed even when they contain claims that, standing alone, would not be within the original jurisdiction of the federal courts. In *College of Surgeons*, the Court determined that "civil action" in section 1441 means the *entire* action initially filed in State court, including both federal claims and claims over which the federal court would not have jurisdiction if they stood alone. 118 S. Ct. at 531. Federal claims and claims falling outside original federal jurisdiction thus constitute a single "civil action." *Id.* at 530. Therefore, if a civil action contains even one federal claim, the civil action is properly removable under section 1441, and the federal court may either exercise its supplemental jurisdiction over the non-federal claims or remand them if appropriate. *Id.* at 533-34.

The Seventh Circuit's reading of the phrase "civil action" in section 1441 in this case cannot be squared with this Court's construction of the identical phrase in 28 U.S.C. § 1367(a) in *College of Surgeons*. Indeed, the Seventh Circuit's erroneous holding in *College of Surgeons* was premised upon its flawed interpretation of "civil action" — the very same mistake it made in this case. The Seventh Circuit incorrectly held that *College of Surgeons* was not a removable "civil action" because it contained a state claim

that the district court could not adjudicate independent of any other grant of jurisdiction. *International College of Surgeons v. City of Chicago*, 91 F.3d 981, 944 (1996). The Court corrected the Seventh Circuit's flawed interpretation, holding that a "civil action" includes federal claims and claims falling within the federal court's supplemental jurisdiction under section 1367. *College of Surgeons*, 118 S. Ct. at 531.

This reasoning applies precisely to this case, dictating that a "civil action" containing federal claims and claims barred by the Eleventh Amendment is removable under section 1441. There is no basis to hold that "civil action," as construed in *College of Surgeons*, excludes claims barred by the Eleventh Amendment. Rather, as in *College of Surgeons*, the entire case — including federal claims and claims outside original federal jurisdiction — constitutes the "civil action" that is removable, although certain claims may have to be remanded to State court following removal. *See College of Surgeons*, 118 S. Ct. at 531. The mere presence of claims barred by the Eleventh Amendment does not defeat removal.

II. The Court's decisions establish that the presence of an Eleventh-Amendment-barred claim does not defeat jurisdiction.

The Court's settled precedent underscores that the Eleventh Amendment bars only particular claims against the State; it does not foreclose federal jurisdiction over whole cases that include such barred claims. *See Pennhurst*, 465 U.S. 89; *Alabama v. Pugh*, 438 U.S. 781 (1978). *See generally* Mitchell N. Berman, Note, *Removal and the Eleventh Amendment: the Case for District Court Remand Discretion to Avoid a Bifurcated Suit*, 92 MICH. L. REV. 3 (1993).

In *Pugh*, the Court dismissed claims against the State of Alabama and its board of corrections on Eleventh Amendment grounds, yet upheld the federal judgment against state officials sued in their individual capacities. *Id.* at 781-82. Because a federal court's lack of subject-matter jurisdiction cannot be waived, *Pugh* must stand for the proposition that the Eleventh Amendment represents a jurisdictional bar only to claims, not to entire cases that contain claims subject to Eleventh Amendment immunity. *See also Pennhurst*, 465 U.S. at 121 ("A federal court must examine each *claim* in a case to see if the court's *jurisdiction over that claim* is barred by the Eleventh Amendment.") (emphasis added).

This precedent establishes that civil actions containing both barred and non-barred federal claims may be removed or brought in federal court in the first instance, even though the district court must remand or dismiss the barred claims. Because civil actions containing both barred and non-barred claims are thus within the district court's "original jurisdiction," they are removable under section 1441(a) if brought initially in a state forum.

Neither the statute's text nor its purpose supports the contrary result — adopted in the Fifth and Seventh circuits[1] — that a plaintiff can foreclose federal-question removal merely by joining a claim barred by the Eleventh Amendment. These decisions permit precisely the forum-shopping that section 1441 was designed to preclude, allowing plaintiffs who plead cleverly to bar removal by States. The decisions also place States in an inferior position

[1] *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), *cert. denied*, 513 U.S. 876 (1994); *McKay v. Boyd Constr. Co.*, 769 F.2d 1084 (5th Cir. 1984).

to all other litigants in relation to removal by erecting a bar that applies to no other litigant.

It would be ironic if the amendment constitutionalizing state sovereign immunity in litigation prevented States from removing non-barred federal claims when the States want them adjudicated in a federal forum. The very sovereignty protected by the Eleventh Amendment should not be compromised by restricting States' removal power as compared to all other litigants. Like other defendants, State defendants might prefer to have some non-barred federal claims heard by federal courts, whose expertise and resources may be greater than state courts, and whose decisions are more likely to produce a uniform body of federal law, given that this Court rarely reviews state-court adjudications of federal law. The proper view of federalism places States on the same footing as other litigants and lets States choose whether to remove.

The Seventh Circuit's position also prejudices non-State entities that might be parties to removed cases involving barred claims against State entities. Under the Seventh Circuit's theory, a non-State entity is precluded from removing an action to federal court if the complaint contains an Eleventh-Amendment-barred claim, even if all claims against the removing party are removable. *See, e.g., Lowery v. Prince George's County*, 960 F. Supp. 952, 957 (D. Md. 1997) (when county and State are both sued, county may not remove under section 1441 when one or more claims barred by Eleventh Amendment). This point is particularly important because non-barred claims in these cases most often are claims against State officials in their individual capacities, and the Seventh Circuit's view prevents those individuals from obtaining a federal forum to adjudicate federal claims against them.

This bizarre result could also obtain when one of the parties sued in State court is the United States, one of its agencies, or one of its officers, because 28 U.S.C. § 1442 also uses the phrase "civil action." Under the Seventh Circuit's interpretation of "civil action," when State and federal defendants are sued in the same case, the federal defendants might be precluded from removing the case if it contained Eleventh-Amendment-barred claims against the State. As the Seventh Circuit interprets "civil action," the Eleventh Amendment might constitute a jurisdictional bar against removal of the entire case, despite the language of section 1442.

The irony of the Seventh Circuit's position is further underscored by the fact that the claims that would most often bar removal under the Seventh Circuit's analysis are generally dismissable in any forum. As in this case, the claims most frequently found to fall within the Eleventh Amendment bar are claims for damages against the State and its agencies under 42 U.S.C. § 1983. But those claims must be dismissed in any forum because States, their agencies, and their employees in their official capacities are not "persons" as defined in Section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Thus, the very claims most likely to bar removal under the Seventh Circuit's interpretation would have to be dismissed in any forum.

CONCLUSION

This Court should reverse the judgment of the Seventh Circuit.

Respectfully submitted,

JEFFREY A. MODISETT
Attorney General of Indiana
JON LARAMORE *
GEOFFREY SLAUGHTER
ANTHONY SCOTT CHINN
Deputy Attorneys General
Indiana Government Center South
402 W. Washington St., Fifth Fl.
Indianapolis, IN 46204
(317) 232-6315

* Counsel of Record

Dated: February 27, 1998

DAN MORALES
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

JAN GRAHAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114

WILLIAM H. SORRELL
Attorney General of Vermont
109 State St.
Montpelier, Vermont 05609-1001

WILLIAM U. HILL
Attorney General of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002

THURBERT E. BAKER
Attorney General of Georgia
40 Capitol Square S.W.
Atlanta, Georgia 30334-1300